89-1080

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,
Petitioner,

VS.

ROBERT L. DOWELL, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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December, 1989

QUESTIONS PRESENTED

Central to the resolution of the primary questions presented below is the answer to the most important unresolved question in desegregation law: What is the *effect* of a finding that a school system has achieved *unitary status?*

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1. Should a compulsory desegregation decree remain operative after a formerly *de jure* school system achieves unitary status?

2. Does the traditional standard for dissolution of injunctive decrees involving private parties, as enunciated in *United States v. Swift & Co.*, 286 U.S. 106 (1932), govern the dissolution of school desegregation decrees?

3. What affirmative desegregative obligations, if any, does a formerly *de jure* school system have following its elimination of official discrimination and the achievement of unitary status?

4. Subsequent to the achievement of unitary status, is a school board's action to adopt an elementary neighborhood school plan which curtails compulsory busing scrutinized by the board's lack of discriminatory intent, or by the plan's racially disproportionate effect?

5. What are the proper criteria for determining whether unitary status has been maintained?

6. Did the court of appeals afford sufficient deference to the factual findings of the district court in compliance with *Anderson v. Bessemer City*, 470 U.S. 564, 573-576 (1985)?

THE PARTIES

1. The original plaintiffs and intervenors in this case were:

Robert L. Dowell, an infant under the age of 14 years of age, who sues by A.L. Dowell, his father as next friend; Vivial C. Dowell, a minor by her father, A.L. Dowell, as next friend; Edwina Houston Shelton, a minor, by her mother Gloria Burse; Gary Russell, a minor, by his father, George Russell; Stephen S. Sanger, Jr., on behalf of himself and all others similarly situated; Jenny Mott McWilliams, a minor and David Johnson McWilliams, a minor, who sue by William Robert McWilliams, their father and next friend, on behalf of themselves and all others similarly situated; Renee Hendrickson, a minor, Bradford Hendrickson, a minor, Cindy Hendrickson, a minor, and Theresa Hendrickson, a minor, who sue by Donna P. Hendrickson, as mother and next friend of each of said minors, and Donna P. Hendrickson, individually, for themselves and all others similarly situated; David Webster Verity, a minor, by and through his next friend George L. Verity, and George L. Verity and Ellen Verity, for themselves and all others similarly situated; Taejemo Danzie, a minor by and through Mrs. A.J. Danzie, her next friend, and Mrs. A.J. Danzie, for themselves and all others similarly situated.

2. The applicants for intervention who sought to reopen this case in 1985 were:

Yvonne Monet Elliot and Donnoil S. Elliot, both minor children, by and through their parent and guardian, Donald R. Elliot; Diallo K. McClarty, a minor child, by and through his parent and guardian, Donna R. McClarty; Donna Chaffin and Floyd Edmun, both minor children, by and through their parent and guardian, Glenda Edmun; Chelle Luper Wilson, a minor child, by and through her parent and guardian, Clara Luper; Donna R. Johnson, Sharon R. Johnson,

Kevin R. Johnson, and Jerry D. Johnson, all minor children, by and through their parent and guardian, Betty R. Walker; Lee Maur B. Edwards, a minor child, by and through his parent and guardian, Elrosa Edwards; Nina Hamilton, a minor child, by and through her parent and guardian, Leonard Hamilton; Jamie Davis, a minor child, by and through his parent and guardian, Etta T. Davis; and Romand Roach, a minor child, by and through his parent and guardian, Cornelia Roach.

3. The original defendants in this case were:

The Board of Education of the Oklahoma City Public Schools, Independent School District No. 89, Oklahoma County, Oklahoma, a public body corporate; Jack F. Parker, Superintendent of the Oklahoma City, Oklahoma public schools; M.J. Burr, Assistant Superintendent of the Oklahoma City, Oklahoma public schools; Melvin P. Rogers, Phil C. Bennett, William F. Lott, Mrs. Warren F. Welch, and Foster Estes, members of the Board of Education of Oklahoma City Public Schools, Independent School District No. 89, Oklahoma County, Oklahoma; William C. Haller, County Superintendent of Schools of Oklahoma County, Oklahoma.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, The Board of Education of Oklahoma City Public Schools, Independent School District No. 89, Oklahoma County, Oklahoma, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit majority acknowledges that its ruling on the effect of a unitary finding is in square conflict with *United States v. Overton*, 834 F.2d 1171 (5th Cir. 1987), and *Riddick v. School Bd. of Norfolk*, 784 F.2d 521 (4th Cir.), *cert. denied*, 107 S.Ct. 420 (1986).

OPINIONS BELOW

The decision of the Court of Appeals for the Tenth Circuit is not yet reported, but is reprinted in the appendix. See App., 1a-45a (majority opinion), 46a-113a (dissenting opinion).

The opinion of the United States District Court for the Western District of Oklahoma is reported at 677 F.Supp. 1503 (W.D. Okl. 1987), and is reprinted in the appendix. See App., 1b-48b.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was entered on October 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The equal protection clause of the Fourteenth Amendment to the United States Constitution is involved in this case.

STATEMENT OF THE CASE

Unlike any school desegregation case this Court has reviewed previously, this case involves a formerly *de jure* school system which eliminated unlawful discrimination through sustained compliance with a compulsory desegregation decree and, eight years subsequent to the achievement of unitary status, was persuaded by intervening demographic changes to adopt a neighborhood school plan, and curtail compulsory busing, for elementary students in grades 1-4. Due to residential segregation, the enrollment at 11 of the system's 64 neighborhood elementary schools was greater than 90 percent black. Respondent's challenge followed.

1. In 1972, pursuant to an earlier finding of *de jure* segregation, the district court handed down a decision ordering the Oklahoma City Board of Education to implement a desegregation plan that came to be known as the "Finger Plan". *Dowell v. Board of Education of Oklahoma City Public*, 338 F.Supp. 1256 (W.D. Okl.), *aff'd.*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972). Like many other desegregation decrees governing large urban school systems, the Finger Plan employed the techniques of pairing, clustering and massive cross-town busing to integrate the schools in Oklahoma City. The district court found the Finger Plan, if implemented in good faith, would create a "unitary system," and emphasized its jurisdiction would be "continuous until it [was] clear that disestablishment of the dual system [was] complete." *Id.* at 1271.

2. After the school district had successfully implemented the Finger Plan for several years, it filed a "Motion to Close Case" on the grounds that it "[had] eliminated all vestiges of state-imposed racial discrimination in its school system, and [was] . . . operating a unitary school system." A response was filed opposing the motion.

Following an evidentiary hearing, the district court entered an order in 1977 terminating the case. In the order, the district court specifically found a "unitary system" had been "slowly and painfully accomplished" in the 16 years during which the cause had been pending.[1] *See* App., 2b.

[1] The district court in 1977 did not, as the court of appeals suggests, merely find "certain components of unitariness to have been satisfied." *See* App., 16a. As the district court itself observed in 1985, "[a]t the time [the] court totally relinquished its jurisdiction over [the] case in 1977, the court was convinced that the Finger Plan

The court recognized the school board had become "sensitized to the constitutional implications of its conduct," and that the board had "a new awareness of its responsibility to citizens of all races." *Id.* Thus, the court released the board "to pursue in good faith its legitimate policies without the continuing constitutional supervision of [the] court . . . ." *Id.* The judicial declaration that unitary status had been achieved was *not* appealed and became final.

3. During the eight years following the unitary declaration, the Oklahoma City School Board continued to implement the tenets of the Finger Plan. However, during the 13 years the plan was implemented, demographic changes slowly took place within Oklahoma City which rendered inequitable that part of the plan affecting elementary students. This became apparent in 1984, when a committee study revealed the continuation of the plan at the elementary level would, *inter alia*, substantially increase the busing burden on young black children, and subject to closure a large number of schools in a predominately black area of the school district.[2] To combat these inequities, and to increase parental involvement, the school board adopted a student assignment plan in 1984 which curtailed compulsory cross-town busing of elementary school children in grades 1-4, and assigned those children to their neighborhood school.

Like most other large metropolitan cities, Oklahoma City has some residentially segregated areas. Thus, the K-4 neighborhood school plan resulted in 11 of the district's 64 neighborhood schools enrolling 90 percent or more black students. The plan, however, incorporates features which foster desegregation. The plan's "majority to minority" transfer provision, for example, allows the parent of any elementary student assigned to a school where their race is in the majority to obtain a transfer to a school where

had been carried out in a constitutionally permissible fashion and that the school district had reached the goal of being a desegregated non-racially operated and *unitary* school system." *Dowell v. Board of Education of Oklahoma City Public Schools,* 606 F.Supp. 1548, 1554 (W.D. Okl. 1985) (emphasis added). *See also, Dowell v. Board of Education of Oklahoma City Public Schools,* 677 F.Supp. 1503, 1506 (W.D. Okl. 1987) ("this court fully intended in 1977 to restore the school board to total independence and relinquish to the board all control over the school district . . . because the Oklahoma City Schools were at that time, as they are today, operating a *unitary* system, wholly without discrimination to blacks or other minority students, faculty or staff.") (emphasis added).

[2] These inequities were directly linked to the K-5 "stand alone" school feature of the Finger Plan. Under the plan, K-5 "stand alone" schools were authorized where racial balance in a neighborhood zone either existed or was subsequently obtained as a result of demographic changes. When K-5 "stand alone" status was granted, young blacks were no longer bused into the zone to achieve racial balance, and the fifth grade was returned to the K-4 elementary school in the zone. After the plan was implemented in 197_, demographic changes slowly took place which brought more and more neighborhoods, especially those in central Oklahoma City, into racial balance. In 1984, as a result of those demographic changes there were more than a dozen elementary schools in Oklahoma City neighborhoods which had a racial balance qualifying them for K-5 "stand alone" status.

The committee study revealed that if K-5 "stand alone" status were granted to the ever increasing number of elementary schools which qualified, then the young black students, previously bused into those schools primarily from the northeast part of Oklahoma City, would have to be reassigned to more distant schools. Since most of the racially balanced neighborhoods were centrally located in Oklahoma City, the reassignment of young blacks would have been to schools located farther north, west or south. The obvious result was to increase the busing burden, in terms of time and distance, on young black children in grades 1-4. Moreover, when a "stand alone" school reacquired its fifth grade, this caused the student population at the fifth year centers located in the northeast quadrant of the district to drop. This accelerated the prospect of school closures and threatened to leave a predominately black part of the community without schools.

Respondents conceded to the existence of these inequities. *See* App., 22b-23b.

their race is in the minority.[3] This transfer option is encouraged through district-provided transportation, and is being exercised by parents in the district. *See* App., 40b. Also, the faculty and staff at all neighborhood elementary schools remain racially mixed. Under the plan, all fifth year centers, middle schools and high schools continue to be racially balanced with the use of compulsory busing.

4. Respondents filed a motion to reopen the case challenging the unitary status of the school district and the constitutional validity of the new plan. They claimed the neighborhood school plan resegregated the school district because it resulted in the creation of some racially identifiable neighborhood schools.

Following an evidentiary hearing, the district court found: (1) its unitary finding in 1977 was binding, (2) that the school district remained unitary in 1985, and (3) that the neighborhood school plan was constitutional since it was not adopted with the intent to discriminate on the basis of race. *Dowell v. Board of Education of Oklahoma City Public Schools*, 606 F.Supp. 1548 (W.D. Okl.), *rev'd.*, 795 F.2d 1516 (10th Cir.), *cert. denied*, 107 S.Ct. 420 (1986). Thus, the court concluded that special circumstances did not exist which warranted reopening the case.

5. The court of appeals agreed that the 1977 finding of "unitariness within the district, ... became final, and ... [was] binding upon the parties." *Dowell v. Board of Education of Oklahoma City Public Schools*, 795 F.2d 1516, 1522 (10th Cir.), *cert. denied*, 107 S.Ct. 420 (1986). However, even though the Oklahoma City School District had achieved unitary status, the court of appeals concluded the school board continued to be governed in 1985 by the terms of the original desegregation order entered 13 years earlier: "[W]ithout specifically dissolving its decree, the court neither abrogated its power to enforce the mandatory order nor forgave the defendants their duty to persist in the elimination of the vestiges of segregation." *Id.* at 1520.

[3] The "majority to minority" transfer option is a recognized desegregation tool. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26-27 (1971); *Board of Education of Oklahoma City Public Schools v. Dowell*, 375 F.2d 158 (10th Cir. 1967).

Although the court recognized that "[w]hen the district court terminated active supervision over the case, it acknowledged that the original purpose of the lawsuit had been achieved," *Id.*, the court viewed the case like any other in which "the injunctive order must survive beyond the procedural life of the litigation." *Id.* at 1521. Despite the unitary declaration, the court saw "no reason why this case should be treated differently from any other case in which the beneficiary of a mandatory injunction seeks enforcement of the relief previously accorded by the court." *Id.* at 1520.

Since the district court had not specifically dissolved the 1972 decree in its order terminating the case, the court of appeals ruled the unitary school district had the burden of proving that the dangers prevented by the 1972 injunction had "become attenuated to a shadow," and that changed circumstances had produced "hardship so extreme and unexpected as to make the decree oppressive," if the neighborhood school plan were to survive. *Id.* at 1521. Thus, the court concluded the district court erred in searching the record for discriminatory intent.

The court of appeals reversed and remanded with instructions that the school board had the burden to prove that "changed conditions require modification or that the facts or law no longer require the enforcement of the order." *Id.* at 1523. These remand directions were handed down with the following *caveat:*

> We have confined our analysis to the narrow issue of the plaintiffs' right to reopen, therefore, our holding should not be construed as addressing, even implicitly, the ultimate issue of the constitutionality of the defendant's new school attendance plan.

Id.

6. The school board filed a Petition for Writ of Certiorari in 1986 because the Tenth Circuit's ruling on the effect of a determination of unitariness was in direct conflict with a Fourth Circuit decision. In the words of the Tenth Circuit:

> The Fourth Circuit has taken a different view with which we cannot agree. In *Riddick v. The School Board of the City of Norfolk,* 784 F.2d 521 (4th Cir. 1986), the court seems to treat a district court order terminating supervision as an order dissolving a mandated integration plan, despite the absence of a specific order to that effect. The court makes a bridge between a finding of unitariness and voluntary compliance with an injunction. We find no foundation for that bridge. . . . A finding of unitariness may lead to many other reasonable conclusions, but it cannot divest a court of its jurisdiction, nor can it convert a mandatory injunction into voluntary compliance.

Dowell, 795 F.2d at 1520 n. 3.

Respondents opposed certiorari due to the lack of a fully developed factual record, and the presence of procedural issues which would cloud this Court's resolution of the conflict. *See,* Brief in Opposition to Certiorari at 23-24, *The Board of Education of Oklahoma City Public Schools v. Dowell* (No. 86-326). Certiorari was denied, 107 S.Ct. 420 (1986), and the conflict left unresolved. Since that time, however, the conflict between the circuits has expanded. Additionally, the conflict is reinforced and perpetuated by the Tenth Circuit's most recent decision. *See* App., 16a-17a, 50a-51a.

7. On remand in 1987, the district court recognized that the "fundamental issue" it had to address, in light of the Tenth Circuit's remand instructions, was "whether the school board had shown a substantial change in conditions warranting dissolution or modification of the 1972 order." *See* App., 5b. Since the existence of residential segregation in some Oklahoma City neighborhoods resulted in the predominately black elementary schools respondents were challenging, the district court recognized the need to determine the causes of present residential segregation in Oklahoma City. After a thorough analysis of pertinent demographic data, relocation statistics and expert testimony, the court found the residential segregation presently existing in Oklahoma City was too "attenuated" to be linked to the unlawful segregation of the past. *Id.* at 5b-18b. Specifically, the court found the current causes of residential segregation in Oklahoma City were: (1) economics and housing affordability, (2) personal preferences and social relationships, (3) urban structure, and (4) to a limited extent, private discrimination. *Id.* at 15b-17b.

The court then examined the evidence to determine whether the school district had maintained its unitary status from 1977 to date. After review of pertinent factual information, the court analyzed the controlling decisions of this Court and concluded once again that the school district remained unitary. *Id.* at 24b-33b. Recognizing that the differentiating factor between *de jure* segregation and *de facto* segregation is the "purpose or intent to segregate," *Keyes v. School District No. 1*, 413 U.S. 189, 208 (1973), the court found that the K-4 neighborhood school plan did not undermine the unitary status of the school district because it was not adopted with the intent to discriminate on the basis of race. Rather, the court found that the neighborhood school plan was adopted for the following non-discriminatory reasons: (1) to avoid increased busing burdens on young black people, (2) to avoid the closure of fifth-year centers in the northeast quadrant, and (3) to increase parental and community involvement. *See* App., 20b-21b, 26b-27b.

Having the benefit of the facts related to the foregoing issues, the district court then addressed the issue of whether the 1972 decree should be dissolved. The court concluded that the facts and law no longer required enforcement of the 1972 decree. In the process of dissolving the decree, the district court relied upon the teaching of *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 22, 24 (1971): it is the dismantling of the "dual school system" which is the target of a desegregation case, and the remedy is designed to operate only during the "interim period" when remedial adjustments are being made to eliminate the dual system. App., 35b, 38b. The Court

found that the purposes of this litigation had been fully achieved, and that the "substantial change in conditions," which over time resulted in the elimination of illegal discrimination, was precisely the change which compelled dissolving the 1972 decree. *Id.* at 35b-39b. Respondents appealed.

8. The Tenth Circuit, in a 2-1 decision, reversed and remanded. The majority "approach[ed] this case not so much as one dealing with desegregation, but as one dealing with the proper application of the federal law on injunctive remedies." *See* App., 3a. The majority took "the simple position that an injunctive order entered in a school desegregation case has the same attributes as any other injunctive order issued by a federal court." *Id.* at 15a. It concluded, therefore, that the standard articulated in *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions"), governed the dissolution of the desegregation decree. *See* App., 11a-12a.

The majority of the panel opined the declaration of unitariness did not fit into the formula because "an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate," and "the court's jurisdiction extends beyond the termination of the wrongdoing." *Id.* at 13a (omitting citations). Thus, "[t]he condition that eventuates as a function of the injunction (unitariness) cannot alone become the basis for altering the decree absent the *Swift* showing." *Id.* To reach this conclusion, the court reiterated and perpetuated the conflict between the circuits:

> Nor, in our view, does a finding of unitariness mandate the later dissolution of the decree without proof of a substantial change in the circumstances which led to the issuance of that decree. *Dowell*, 795 F.2d at 1521; *Contra United States v. Overton*, 834 F.2d 1171 (5th Cir. 1987); *Riddick v. School Bd. of Norfolk*, 784 F.2d 521 (4th Cir.), *cert. denied*, 107 S.Ct. 420 (1986).

Id. at 16a-17a.

Notwithstanding the unitary declaration, the panel majority found the board had the "affirmative duty . . . not to take any action that would impede the process of disestablishing the *dual* system and its effects." (citing *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. at 538) (emphasis added) *Id.* at 42a. The majority, therefore, did not focus on whether the plan was "non-discriminatory".[4] *Id.* at 41a. Finding the board did not meet its burden under *Swift* to dissolve the decree, the court remanded the case with instructions, *inter alia*, to take evidence on alternatives to "maintain racially balanced elementary schools." *Id.* at 44a.

The dissent found three primary flaws in the majority's reasoning. First, that the *Swift* standard generally applied in the context of terminating anti-trust injunctions, or other commercial injunctions between private parties, is unwarranted and impractical in school desegregation

[4] Even though the court concluded that discriminatory intent was not the pertinent inquiry, it nonetheless ruled that the district court entered clearly erroneous findings on the question of intent in the absence of an argument from respondents to that effect. The court rejected the plan because it "restore[d] the effects of past discriminatory intent remedied by the decree by recreating racially identifiable elementary schools, overlooking school capacity problems, and failing to address faculty imbalance." App., 41a-42a.

cases where the important values of local control of public school systems dictate that a federal court's regulatory control not extend in perpetuity. *See* App., 60a-65a.

Next, the dissent questioned the inadequate recognition the majority gave to the legal effect of the school district's unitary status. Recognizing the conflict between the circuits on this issue, the dissent sided with *Riddick v. School Bd.*, 784 F.2d 521, 535, 534-39 (4th Cir.), *cert. denied*, 107 S.Ct. 420 (1986), and *United States v. Overton*, 834 F.2d 1171, 1176, 1174-77 (5th Cir. 1987), to reach the conclusion that once a school district becomes unitary, continued federal control should cease. *Id.* at 50a-51a. Aware that "the differentiating factor between *de jure* and . . . *de facto* segregation . . . is purpose or intent to segregate," *id.* at 49a (quoting *Keyes*, 413 U.S. at 208), the dissent reasoned that "plaintiffs were required to demonstrate that the district had lost its unitary status through purposefully segregative school board actions." *Id.* at 50a.

Finally, the dissent was quite critical of the insufficient deference the majority afforded to the factual findings of the district court concerning segregative intent.

> This court's approach to the school board's evidence is to judge it against an improper legal standard given the unitary status of the school district. This court then compounds the problem by searching the record for conflicting evidence and holding the school board to an impossible standard of proof which does not allow the school board to prevail if there is any conflicting evidence. This practice is di-

rectly contrary to the standard by which we carry out our appellate function. *Anderson*, 470 U.S. at 573-576.

Id. at 99a.

In sum, the dissent concluded that the majority ruling "denie[d] the essence of unitariness," and appeared to "impose greater substantive burdens on a school board than before the unitary finding." *Id.* at 74a. Recognizing that the school district "proved non-segregative purpose to the district court," the dissent was of the view that the school district should not be monitored by the court in perpetuity. *Id.* at 113a. The dissent would have lifted the original desegregation decree and entrusted the schools to local control. *Id.*

REASONS FOR GRANTING THE WRIT

In *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 6 (1971), this Court granted certiorari to assist schools and courts across the country, then struggling under the mandate to dismantle dual systems, by "defining in more precise terms . . . the scope of the duty of school authorities and district courts in implementing *Brown I*." Through the guidance provided in *Swann*, scores of school districts subsequently accomplished the affirmative duty to desegregate and achieved unitary status.

This Court, however, has not yet specifically ruled on the meaning of unitariness and its effect on extant decrees. Lower courts are addressing this important issue with divergent results. Eighteen years following *Swann*, schools and courts across this country need further guidance from this Court defining the legal significance of unitary status. It is beyond serious dispute that this is the most important unresolved constitutional question concerning school desegregation.

I. THE CONFLICT BETWEEN THE CIRCUITS ON THE MEANING OF UNITARY STATUS MUST BE RESOLVED.

The Tenth Circuit's decision is in direct conflict with a factually indistinguishable case decided by the Fourth Circuit, *Riddick v. School Bd of City of Norfolk*, 784 F.2d 521 (4th Cir.), *cert denied*, 107 S.Ct. 420 (1986). *See* App., 16a-17a. The Norfolk school system in 1975 was found unitary in an order which terminated jurisdiction without dissolving the desegregation decree. Several years later the Norfolk board adopted a neighborhood elementary school plan which curtailed compulsory busing of students in grades 1-6. Because of residential segregation, a number of Norfolk's neighborhood schools were racially identifiable. The Norfolk plan, like the Oklahoma City plan, was prompted by demographic changes, and incorporated a "majority to minority" transfer provision. The plan was unsuccessfully challenged in district court, and the principle issue on appeal was the effect of the unitary finding upon the challenge to the new plan. *Id.* at 534.

Recognizing the pronouncement in *Swann* that unitary status signifies the complete elimination of unlawful segregation, the Fourth Circuit ruled "once the goal of a unitary system is achieved, the district court's role ends" *Id.* at 535, and held that the order finding Norfolk unitary "returned control of the city's schools to the school board." *Id.* at 538.

Deciding the case under the *de facto/de jure* distinction recognized in *Keyes v. School District No. 1*, 413 U.S. 189 (1973), the Fourth Circuit ruled that judicial involvement does not "continue in perpetuity to prevent resegregation absent a showing of intent to discriminate." *Riddick*, 784 F.2d at 534. Thus, the court decided the district court correctly placed the burden upon those attacking the neighborhood school plan to prove the school board adopted the plan "with an intent to discriminate on the basis of race." *Id.*

The Tenth Circuit in 1986 was aware of *Riddick*, but could not distinguish it. It stated *Riddick* "seems to treat a district court order terminating supervision as an order dissolving a mandated integration plan, despite the absence of a specific order to that effect." *Dowell v. Board of Education of Oklahoma City Public Schools*, 795 F.2d 1516, 1520 n. 3 (10th Cir. 1986). The Tenth Circuit simply concluded that "[t]he Fourth Circuit has taken a different view with which we cannot agree." *Id.*

In its most recent decision, the Tenth Circuit relied upon its previous decision in *Dowell*, and recognized that its ruling now conflicts not only with *Riddick*, but also with a recent Fifth Circuit decision:

> Nor, in our view, does a finding of unitariness mandate the later dissolution of the decree without proof of a substantial change in the circumstances which led to the issuance of that decree. *Dowell*, 795 F.2d at 1521; *Contra United States v. Overton*, 834 F.2d 1171 (5th Cir. 1987); *Riddick v. School Bd. of Norfolk*, 784 F.2d 521 (4th Cir.), *cert. denied*, 107 S.Ct. 420 (1986).

App., 16a-17a.

The decisions of the Tenth, Fourth and Fifth Circuits squarely conflict on the question of when judicial control should cease in a desegregation case.

The Tenth Circuit holds that the pertinent inquiry is not whether unitary status has been achieved, but rather, whether the *Swift* standard has been met. On the other hand, the Fourth Circuit holds the achievement of unitary status, signifying the elimination of unlawful segregation, is the important inquiry, despite the absence of an order dissolving the original decree. Under the Fourth Circuit's analysis, parties challenging a unitary school system's neighborhood school plan have the burden of proving discriminatory intent. Yet, under the same circumstances, the Tenth Circuit's analysis discounts the question of intent and places the burden on the unitary school district to justify the plan's racially disproportionate effect. *Riddick* and *Dowell* could not be more diametrically opposed.

The Fifth Circuit in *United States v. Overton*, 834 F.2d 1171 (5th Cir. 1987), analyzed the conflict between the Tenth and Fourth Circuits, and sharply rejected *Dowell*:

> The difficulty with *Dowell's* approach is that it denies meaning to unitariness by failing ever to end judicial superintendence of the schools . . . .
>
> We see *Dowell's* effort to declare a school system to be unitary while retaining jurisdiction as an illusion that denies the essence of unitariness . . . .
>
> In sum, the idea that a school district can be declared unitary and yet be answerable to the

> federal courts for failure to abide by desegregation plans, regardless of segregative purpose, is at war with itself.

Overton at 1175, 1176, 1177.

The Fourth and Fifth Circuits are not alone. The First and Ninth Circuits also hold "that current desegregation law does not envision continued federal jurisdiction in the affairs of local school districts in perpetuity once a school district becomes unitary."[5] *See* App., 50a-51a (dissent).

The importance of the conflict between the circuits, and the need to resolve it, is perhaps best illustrated by the attention it has received from the legal community. *See, Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 Harv.L.Rev. 653-54 (1987) ("It is unclear, however, whether the school board bears any burden of justifying challenged actions that reintroduce racial separation after a court declares the formerly dual school system unitary and relinquishes jurisdiction. The United States Supreme Court has recently refused to resolve seemingly contradictory federal appeals court holdings on this issue [citing the denial of certiorari in *Riddick* and *Dowell*]. Because the burden allocation can, in cases where the intent evidence is not dispositive, determine the outcome, the question is of enormous importance.");

[5] *See Morgan v. Nucci*, 831 F.2d 313, 318 (1st Cir. 1987) ("Although the [Supreme] Court has produced no formula for recognizing a unitary school system, the one thing certain about unitariness is its consequences: the mandatory devolution of power to local authorities."); *Spangler v. Pasadena Bd. of Educ.*, 611 F.2d 1239, 1241 (9th Cir. 1979); *Id.* at 1247 ("Retention of jurisdiction where there is no longer a demonstrated need to monitor compliance may defeat important governmental and personal interests. . . . There is no warrant for retaining further jurisdiction in the case, and the district court should enter an order relinquishing all further jurisdiction.") (Kennedy, J. concurring).

Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 La.L.Rev. 789, 815 (1988) ("The conflict between the circuits poses interesting issues as to the nature of permanent injunctions and continuing jurisdiction. . . ."); Chandler, *The End of School Busing? School Desegregation and the Finding of Unitary Status*, 40 Okla.L.Rev. 519, 553 (1987) ("The disagreement between the Fourth and Tenth Circuits in *Riddick* and *Dowell* in regard to how a finding of unitary status affects earlier desegregation orders suggests the need for a common procedure for courts to follow in relinquishing control over school board decisions."); Beard, *The Role of Res Judicata in Recognizing Unitary Status and Terminating Desegregation Litigation: A Response to the Structural Injunction*, 49 La.L.Rev. 1239, 1240 (1989) ("A critical issue in desegregation law is how a school district once found to have been *de jure* segregated becomes 'unitary'. This issue is already of considerable practical importance and will become more so as a greater number of school districts begin to move for recognition of their unitary status. Yet the issue has never been clearly addressed by the Supreme Court, and has only recently received attention in the lower courts." [citing *Overton, Dowell* and *Riddick.*]); *See also* Note, *The Unitariness Finding and Its Effect on Mandatory Desegregation Injunctions*, 55 Fordham L.Rev. 551, 554 n. 12 (1987) (focusing on "the conflicting views of the effect of a unitariness finding as recently articulated by the Court of Appeals for the Fourth and Tenth Circuits."); Note, *The Unitariness Dilemma: The First Circuit's Attempt to Develop a Test for Determining When a System is Unitary*, 66 Wash.U.L.Q. 615, 625 n. 75 (1988) ("Without guidance from the Supreme

Court, [the Fourth and Tenth] circuits reached opposite conclusions on the issues of burden of proof and continued control of the system after a declaration of unitariness by the district court."); Note, *Unitariness and Busing: Placing the Burden of Proof for Obtaining Judicial Review When a School Board Stops Busing,* 92 Dick.L.Rev. 437, 459-60 (1988) ("Elementary school busing, as Justice Powell indicated in his separate opinion in *Keyes*, is not a wonder drug; busing young children has side-effects which school systems seek to avoid. *Riddick* and *Dowell* exemplify this principle and indicate that the time has come for the courts to reevaluate the busing remedy.").

The conflict is now ripe for resolution. The record in this case is now well developed factually, and the procedural cloud present when certiorari was denied in 1986 no longer exists. The risk of inconsistency can only increase if the lower courts are left to pick and choose between the squarely conflicting rules which presently exist. How the equal protection clause of the fourteenth amendment is applied simply should not depend on the part of the country where one lives.

II. BY HOLDING THE *SWIFT* STANDARD GOVERNS THE DISSOLUTION OF A REMEDIAL DECREE, THE TENTH CIRCUIT RULED ON AN IMPORTANT UNSETTLED QUESTION OF CONSTITUTIONAL LAW IN A MANNER INCONSISTENT WITH PRINCIPLES PREVIOUSLY ANNOUNCED BY THIS COURT.

Addressing the unresolved question of when a desegregation case should end "has become a

practical necessity." *See* Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal,* 86 Colum.L.Rev. 728, 790 (1986).

The Tenth Circuit decided this important question without giving any weight to the achievement of unitary status. It relied upon the standard set forth in *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932), an anti-trust case, for the proposition that, despite unitariness, "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" warrants dissolution of a desegregation decree. *See* App., 11a-12a. However, as the dissent correctly noted, "[v]irtually all of the cases relied upon by [th]e court in its application of *Swift* involve unsuccessful attempts to obtain, modify or dissolve injunctions which forbid or limit private commercial conduct." *See* App., 62a.

Swift and its progeny are simply ill-suited for application in desegregation cases involving governmental agencies where sensitivity to the importance of local control is essential.[6] Justice (then Judge) Kennedy explained the inapplicability of *Swift* to a district court's termination of equitable jurisdiction in school desegregation cases in *Spangler v. Pasadena Bd. of Educ.*, 611 F.2d 1239, 1245 n. 5 (9th Cir. 1979):

> *Swift* involved the efforts of anti-trust defendants who had entered into a consent decree prohibiting anti-competitive actions to modify

[6] It appears the court of appeals drifted off course by concluding that "Fed.R.Civ.P. 60(b) codifies th[e] [*Swift*] standard." *See* App., 13a. Rule 60(b), however, does not codify substantive law. *See,* Fed.R.Civ.P. 60(b) advisory committee note (1946 amendment) ("It should be noted that Rule 60(b) does not assume to define substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief.")

> the decree by lifting some of its prohibitions. It is doubtful the case supports the district court's retention of jurisdiction. *Swift* establishes general criteria for dissolution or modification of prohibitory injunctions against private wrongdoers. More recent Supreme Court desegregation decisions have established specific criteria for dissolution of regulatory injunctions imposed upon public school authorities. . . . [T]hese criteria recognize (1) that the proper function of a school desegregation decree is remedial, and (2) necessary concern for the important values of local control of public school systems dictate that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination. *See, Milliken v. Bradley* [*Milliken II*], . . . 433 U.S. [267,] at 280-82, 97 S.Ct. 2749 [(1977)].

See also, Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 La.L.Rev. 769, 828 (1988) (The *Swift* "articulation has been criticized as having 'language perhaps too strongly adverse to the possibility of modification.' In any event, that standard probably does not apply to school desegregation decrees. . . ." [quoting Restatement (2d) of Judgments, Reporter's Note on Section 73, at 201 (1982)]); *Moneystore, Inc. v. Harriscorp. Finance, Inc.*, 885 F.2d 369 (7th Cir. 1989) (Posner, J., concurring) (observing the *Swift* standard, applicable in litigation over property rights, is ill-suited in litigation designed to reform public agencies).

The Tenth Circuit's application of the *Swift* standard to a unitary school district overlooks the fact that the constitutional violation has been

remedied. *See* App., 13a. ("The condition that eventuates as a function of the injunction cannot alone become the basis for altering the decree absent the *Swift* showing."). This approach confuses the remedy with the constitutional violation. As the Fifth Circuit observed in *Overton*:

> [C]ontinuing limits imposed as a remedy after the wrong is righted effectively changes the constitutional measure of the wrong itself; it transposes the dictates of the remedy for the dictates of the constitution and, of course, they are not interchangeable. Stated another way, the constitutional violation is purposeful separation of races in public education. The mix that would have occurred but for the racism is a judicially created hypothetical. We have insisted upon matching that model of a unitary desegregated status as a remedy for the wrong. Refusing, after the match, to allow a school district to vary from that model unless it proves its 'non-segregative' purpose confuses wrong and remedy.

834 F.2d at 1176-77.

In applying the *Swift* standard to the dissolution of a desegregation decree, the Tenth Circuit simply failed to recognize that "[t]he issues involved in terminating a remedy generally mirror those a court faces when initiating a remedy." *See* Gewirtz, *supra* at 790. Thus, the court overlooked the import of "local" control, *Milliken v. Bradley*, 433 U.S. 267 at 280-82 (1977), and neglected to recognize that the remedy is designed "to repair the denial of a constitutional right," and to operate only during the "interim period" when remedial adjustments are being made to eliminate the dual school system. *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 16, 28 (1971).

Indeed, *Swift* itself distinguishes "between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative." *Swift*, 286 U.S. at 114.

The Tenth Circuit's imposition of the *Swift* standard can only serve to have a chilling effect on legitimate changes in educational policy and to defeat important governmental and personal interests. The school board will be obligated under the governance of a continuing decree to take racial factors into account in making important policy decisions long after discrimination has been eliminated and unitary status has been achieved. The most significant problem with *Swift's* mandate for continued judicial superintendence is the lack of judicial accountability for the results.

The facts in this case provide this Court full opportunity to decide when a desegregation decree should be lifted. The decree in Oklahoma City was implemented in 1972. Unitary status was achieved in 1977, and the board continued to implement the decree until 1985 when it became oppressive at the elementary level. In sum, an entire generation was educated under the governance of the Finger Plan. The question of when a desegregation decree should be lifted is an important unsettled question, intertwined with the meaning of unitariness itself, which warrants independent review by writ of certiorari.

III. THE COURT OF APPEALS SO FAR DEPARTED FROM ACCEPTED PRACTICE AS TO WARRANT THIS COURT'S SUPERVISION.

When respondents appealed the district court's decision, they did not assert that the court's finding on the lack of discriminatory intent was "clearly erroneous". *See*, Docketing Statement at 5. Notwithstanding, the court of appeals struck down the district court's intent finding on this basis.

There were two permissible views of the evidence in this case. Indeed, the panel majority recognized there was "evidence to facially support the district court's findings." *See* App., 41a. In *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985), this Court ruled that where "there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."

A dispassionate reading of the dissenting panel member's opinion demonstrates without question that the majority overstepped the bounds of its duty under Fed.R.Civ.P. 52(a) by reweighing the evidence. *See* App., 53a-60a, 86a-113a.

The *Anderson* standard "does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced it would have decided the case differently." 470 U.S. at 573-576. Such a grave departure from this standard is additional justification for granting the writ.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

December, 1989

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 88-1067

ROBERT L. DOWELL, an infant under the age of 14 years of age, who sues by A.L. Dowell, his father, as next friend,
Plaintiff-Appellant,

VIVIAN C. DOWELL, a minor, by her father, A.L. Dowell, as next friend; EDWINA HOUSTON SHELTON, a minor, by her mother, Gloria Burse; GARY RUSSELL, a minor, by his father, George Russell; STEPHEN S. SANGER, on behalf of himself and all others similarly situated,
Plaintiffs-Intervenors-Appellants,

v.

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT DISTRICT NO. 89, OKLAHOMA CITY, OKLAHOMA, a Public Body Corporate; JACK F. PARKER, Superintendent of the Oklahoma City, Oklahoma Public Schools; M.J. BURR, Assistant Superintendent of the Oklahoma City, Oklahoma Public Schools; MELVIN P. ROGERS, PHIL C. BENNETT, WILLIAM F. LOTT, MRS. WARREN F. WELCH, FOSTER ESTES, Members of The Board of Education of Oklahoma City Schools, Independent District No. 89, Oklahoma County, Oklahoma; WILLIAM C. HALLER, County Superintendent of Schools of Oklahoma County, Oklahoma,
Defendants-Appellees,

JENNY MOTT MCWILLIAMS, a minor, and DAVID JOHNSON MCWILLIAMS, a minor, who sue by William Robert McWilliams, their father and next friend, on behalf of themselves and all others similarly situated; RENEE HENDRICKSON, a minor, BRADFORD HENDRICKSON, a minor, TERESA HENDRICKSON, a minor, and CINDY HENDRICKSON, a minor, who sue by Donna P. Hendrickson, as mother and next friend of each of

said minors; and DONNA P. HENDRICKSON, Individually, and for themselves, and all others similarly situated,

Defendants-Intervenors-Appellees,

DAVID WEBSTER VERITY, a minor, by and through his next friend, George L. Verity; GEORGE L. VERITY and ELLEN VERITY, for themselves and all others similarly situated; TAEJEMO DANZIE, a minor, by and through Mrs. A.J. Danzie, her next friend; and MRS. A.J. DANZIE, for themselves and all others similarly situated,

Intervenors.

[Filed October 6, 1989]

Appeal from the United States District Court
For the Western District of Oklahoma
D.C. No. CIV-61-9452-B

Norman J. Chachkin (Julius L. Chambers and Janell M. Byrd, New York, New York; Lewis Barber, Jr. of Barber and Traviolia, Oklahoma City, Oklahoma; and John W. Walker and Lazar M. Palnick of John W. Walker, P.A., Little Rock, Arkansas, with him on the briefs), New York, New York, for Appellants.

Ronald L. Day of Fenton, Fenton, Smith, Reneau & Moon, Oklahoma City, Oklahoma, for Appellees.

Wm. Bradford Reynolds, Assistant Attorney General, David K. Flynn and Mark L. Gross, Attorneys, Department of Justice, on the briefs for the United States as Amicus Curiae.

Before SEYMOUR, MOORE, AND BALDOCK, Circuit Judges.

MOORE, Circuit Judge.

Since its genesis, this litigation has sought to eradicate the effects of an official policy of racial segregation in the public schools of Oklahoma City,

Oklahoma, and assure that each child enrolled in an Oklahoma City School enjoys the same right to a public education. We are now at a crossroad in the substantive and procedural life of this case and must decide whether, after our last remand, the district court followed the correct path, terminating its prior decree and finding a new student assignment plan implemented under that decree constitutional. *Dowell v. Board of Educ. of Okla. City Pub. Schools*, 677 F. Supp. 1503 (W.D. Okla. 1987). We approach this case not so much as one dealing with desegregation, but as one dealing with the proper application of the federal law on injunctive remedies. We believe that the law in this area is unambiguous, and simply because the roots of the matter lie in school desegregation, there is no reason to depart from the longstanding principles which form the structure of that law. Upon our review, we conclude the trial court did not follow the proper path and reverse the judgment dissolving the 1972 injunctive decree. We remand the case for modification of the decree consistent with this order.

I. Background

We have previously summarized the history of this case, *Dowell v. Board of Educ. of Okla. City*, 795 F.2d 1516, 1517, n.1 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986), tracing its metamorphosis from filing in 1961 to the generation of an equitable remedy in 1972. *Dowell v. Board of Educ. of Okla. City Pub. Schools*, 338 F. Supp. 1256 (W.D. Okla. 1972). In 1986, when last before us, plaintiffs urged review of the district court's refusal to reopen the case to consider their petition for enforcement of the court's prior injunctive decree. The motion to reopen was triggered by the implementation of a new student assignment plan in 1984.

Until that time, defendants, the Board of Education of the Oklahoma City Public Schools, school officials, and individual board members, (the Board or defendants) operated the Oklahoma City School Dis-

trict (the District) under the Finger Plan, a court ordered desegregation plan prepared by Dr. John A. Finger, Jr., a Professor of Education at Rhode Island College and authority on issues of school desegregation.[1] Under the Finger Plan, attendance zones were redesigned so that high schools and middle schools enrolled black and white students. Black elementary students in grades 1 through 4 were bused to previously all white elementary schools while majority black elementary schools were converted into 5th-year centers with enhanced curricula. Black fifth graders then attended the 5th-year center in their neighborhood, while white fifth graders were bused for the first time into black neighborhoods to attend class. Excepted from the Finger Plan were certain schools enrolling grades K-5, which were designated "stand alone." These schools were located in neighborhoods that were racially balanced. Kindergarten children attended their neighborhood elementary school unless their parents chose to send them to another school to join a sibling or be closer to the parent's workplace. Aside from minor alterations necessitated, for example, by a school's closing, the Board maintained the District under the Finger Plan's basic techniques of pairing, clustering, and compulsory busing, even after the district court declared the District unitary and terminated the case. *Dowell v. School Bd. of Okla. City Pub. Schools*, No. CIV-9452, slip op. (W.D. Okla. Jan 18, 1977).

Seven years later, the Board adopted a new student assignment plan, the Student Reassignment Plan, (the Plan), which was implemented for the 1984-85 school year. The Plan eliminated compulsory busing in grades 1 through 4 and reassigned elementary students to their neighborhood schools. A "majority to minority" transfer option (M & M) was retained to

[1] The Finger Plan was adopted only after the Board failed to produce an acceptable desegregation plan to the district court.

permit elementary students assigned to a school in which they were in the majority race to transfer to one in which the student would be in the minority. Fifth-year centers would remain throughout the District and, like the middle schools and high schools, would continue to maintain racial balance through busing. The Plan created the position of an "equity officer" assisted by an equity committee to monitor all schools to insure the equality of facilities, equipment, supplies, books, and instructors. *Dowell v. Board of Educ. of Okla. City Pub. Schools*, 606 F. Supp. 1548, 1552 (W.D. Okla. 1985). The Plan professed to maintain integrated teaching staffs in line with the District's affirmative action goal. As a consequence of the Plan, eleven of the District's sixty-four elementary schools enrolled 90%+ black children. Twenty-one elementary schools[2] became 90%+ white and non-black minorities.[3] Thirty-two elementary schools remained racially mixed.

In February 1985, plaintiffs filed a motion to intervene and reopen the case claiming the Board unilaterally abandoned the Finger Plan. Although the record indicated the subsequent hearing was limited to "the question of whether this case shall be reopened and the applicants allowed to intervene shall be tried and disposed of," *Dowell*, 795 F.2d at 1523 (emphasis omitted), the district court received evidence on the constitutionality of the Plan and disposed of all of the substantive issues defendants raised. The district court concluded the Plan was constitutional and found no special circumstances justifying relief under Fed. R. Civ. P. 60(b) to support reopening. *Dowell*, 606 F. Supp. at 1557.

We reversed, holding the court abused its discretion in failing to reopen the case and prematurely

[2] These numbers are taken from Def. Ex. 63. Schools with less than 10.7% black population were included in the total.

[3] In Oklahoma City, Indian, Spanish, and Oriental children comprise the non-black minority population counted.

reached the merits of the Plan's constitutionality without permitting plaintiffs the opportunity to support their petition for enforcement of the mandatory injunction which the court had never dissolved or modified. *Dowell*, 795 F.2d at 1523. Key to our disposition was the reassertion of the parties' burden of proof under Fed. R. Civ. P. 60(b).[4] We stated that on remand, the plaintiffs, beneficiaries of the original injunction, only have the burden of showing the court's mandatory order has been violated. "The defendants, who essentially claim that the injunction should be amended to accommodate neighborhood elementary schools, must present evidence that *changed conditions require modification* or that the facts or law no longer require the enforcement of the [1972] order." *Id.* (citation omitted) (emphasis added). Nothing in this disposition touched on the underlying constitutional issues. "[O]ur holding should not be construed as addressing, even implicitly, the ultimate issue of the constitutionality of the defendants' new school attendance plan." *Id.* at 1523. Remand was confined to a determination of "whether the original mandatory order will be enforced or whether and to what extent it should be modified." *Id.*[5]

During the eight-day hearing on these remand instructions, defendants[6] introduced a golconda of testimony and exhibits to establish their position that substantial demographic changes in the District ren-

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[4] Fed. R. Civ. P. 60(b) states:

On motion and upon such terms as just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding . . .

[5] The dissent takes several opportunities to disagree with this unreversed holding. Nonetheless, it is the directive with which this court remanded the case, and the trial court was not free to depart from our mandate. Moreover, the holding is the present law of this circuit.

[6] Although the stipulation was not found in the pretrial order, we presume the parties agreed the injunction had been violated because defendants presented their evidence of substantial change first.

dered the Finger Plan inequitable and oppressive. The inequity, the Board maintained, surfaced primarily in the burgeoning number of schools that qualified for stand-alone status, thus necessitating that black children be transported greater distances to attend racially balanced elementary schools. Defendants' expert, Dr. William A. Clark, a specialist in population geography, testified on the migration and mobility of the black population in the District. Dr. Clark was satisfied that the residential pattern that developed in the District since the implementation of the Finger Plan was not a vestige of what had occurred thirty-five or forty years before and that "black preference" accounted for the dispersal of the black population throughout the District. While recognizing that socioeconomic factors must be considered in any housing decision, Dr. Clark maintained that the most significant motivation was preference.

Dr. Finis Welch, an economist at the University of California, offered testimony on studies he conducted of the dissimilarity and exposure indices of residential areas on which the Plan was based. Dr. Welch opined that the increasing number of stand-alones would "draw down" the 5th-year centers which, he projected, would result in closing more schools in the northeast quadrant, the area of central Oklahoma City which remains majority black.

Three Board members testified about their involvement in the preparation of the Plan. The District's superintendent, several black school administrators, and various members of the community offered their views on an array of issues, from linking neighborhood schools to black achievement, to the value of parental involvement in a child's education. Ms. Susan Hermes, a member of the committee which prepared the Plan, stated that she believed "educationally it is better for a child to have family nearby." (R. IV, 390). Over plaintiffs' objection, counsel for the Board asked each witness if he or she believed the

District remained unitary after implementation of the Plan. The court, also over plaintiffs' objection, asked key defense witnesses if the Plan was adopted with discriminatory intent.

Through cross-examination and in its presentation of evidence, plaintiffs offered a contrasting analysis of the issues of demographic change, the impact of the Plan, and the Board's alternative approaches of the Effective Schools Program, increased parental participation in PTA, and equity supervision. Dr. John Finger, who had prepared the original plan, rejected each of these features of the new Plan noting that Effective Schools and increased parental participation deal with different problems and cannot be substituted for a desegregated education. Dr. Gordon Foster, a professor of education at the University of Miami, testified about a student assignment plan he had prepared for plaintiffs to solve the perceived inequities of busing under the Finger Plan.

In its subsequent order, the district court initially observed it was "now aware that it should have dissolved the injunction in 1977, as pointed out in the Circuit opinion, because the Oklahoma City schools were at that time, as they are today, operating as a unitary system, wholly without discrimination to blacks or other minority students, faculty or staff." *Dowell*, 677 F. Supp. at 1506. Nevertheless, the court apprehended the command we framed in our prior review. "The fundamental issue the court must address is whether the School Board has shown a substantial change in conditions warranting dissolution or modification of the 1972 Order." *Id.* Relying on the testimony of Drs. Clark and Welch, the court concluded:

> [T]he Oklahoma City Board of Education has taken absolutely no action which has caused or contributed to the patterns of residential segregation which presently exist in areas of Oklahoma City. If anything, the actions of the Board of Education, through implementation of the Finger Plan at all grade levels for more than a decade, have fostered the neighborhood integration which has occurred in Oklahoma City.

Id. at 1512.

Thus, unlinking the Board from existing residential segregation and satisfied that demographic changes rendered the Finger Plan inequitable,[7] the court proceeded to examine the constitutionality of the Plan. Acknowledging that "[a] once unitary school district may lose its unitary status by partaking in intentionally discriminatory acts creating de jure segregation," *id.* at 1515, the court set forth the guidelines established in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), and *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973).

> The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the School Board which [was] intended to, and did in fact discriminate against minority pupils, teachers, or staff.

Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977).

The court reviewed the evidence and concluded that not only did legitimate nondiscriminatory factors motivate the adoption of the Plan, but, also, that the Plan currently maintained a unitary district which enjoyed increased parental and community involve-

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[7] To reach this conclusion, the district court accepted defendants' prediction that as new areas of the district qualified for "stand-alone" status, the distances which black students in grades 1-4 would have to be transported to attend integrated schools would increase. Fifth-grade centers in the northeast quadrant would then close because of the consequent diminished enrollment.

ment and included safeguards such as the equity officer and Effective Schools Program to insure continued unitariness. While the court entertained plaintiffs' contention that the Plan did have a disproportionate impact upon some blacks in the District, it concluded that racial imbalance in the schools, without more, does not violate the Constitution, citing *Milliken v. Bradley*, 433 U.S. 267 (1977). "It follows that a school board serving a unitary school system is free to adopt a neighborhood school plan so long as it does not act with discriminatory intent." *Dowell*, 677 F. Supp. at 1518. The court rejected plaintiffs' claim that the Plan is a step toward a dual school system as "ludicrous and absurd." *Id.* at 1524. In light of these findings of fact and conclusions of law, the district court determined the Foster Plan, plaintiffs' proposed modification of the 1972 decree, was neither feasible nor necessary.

Plaintiffs appeal this order, contending essentially that the district court misapplied the instructions on remand and misperceived the function of the unitary status achieved in 1977 to be a post-decree change in circumstances warranting dissolution of the injunction. In dissolving the injunction, plaintiffs urge the court abused its discretion by relying on clearly erroneous findings of fact.

II. Standard of Review

At the outset, we must underscore this case involves an injunction upon which relief was sought pursuant to Fed. R. Civ. P. 60(b). *Dowell*, 795 F.2d at 1522.[8] Thus, our review focuses on whether the district

[8] The dissent takes the position that because this case involves the desegregation of a public school system, the usual standards applicable to federal law on injunctive remedies are inapposite. The Supreme Court has said, "However, a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

court abused its discretion in granting the Board's motion to dissolve the injunction and denying plaintiffs' motion to modify the relief. On appeal we will not disturb the district court's determination except for an abuse of discretion. *Securities and Exch. Comm'n v. Blinder, Robinson & Co., Inc.*, 855 F.2d 677 (10th Cir. 1988). The district court's exercise of discretion, however, must be tethered to legal principles and substantial facts in the record. *Evans v. Buchanan*, 582 F.2d 750, 760 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980). "[D]iscretion imports not the court's inclination, but . . . its judgment; and its judgment is to be guided by sound legal principles." *Franks v. Bowman Trans. Co.*, 424 U.S. 747, 770-71 (1976) (citation omitted).

III. Standard for Modification

While a court's equitable power to fashion a remedy is broad and its continuing duty to modify or vacate relief inheres to the prospective nature of the relief,[9] modification is subject to an exacting standard from which this circuit has not wavered. *See Blinder, Robinson*, 855 F.2d at 679; *Equal Employment Opportunity Comm'n v. Safeway Stores, Inc.*, 611 F.2d 795 (10th Cir. 1979), *cert. denied*, 446 U.S. 952 (1980); *Securities and Exch. Comm'n v. Thermodynamics, Inc.*, 464 F.2d 457 (10th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973).

This standard, first articulated in *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932), requires "[n]othing less than a clear showing of grievous wrong evoked by

[9] The Court stated in *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932), "A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need."

new and unforeseen conditions . . . to change what was decreed after years of litigation with the consent of all concerned."[10] The Court cautioned:

> There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. *We are not at liberty to reverse under the guise of readjusting.* Life is never static and the passing of a decade has brought changes to the grocery business as it has to every other. *The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow.*

Swift, 286 U.S. at 119 (emphasis added).

Hence, to pass muster under this test, the party seeking relief from an injunctive decree "must demonstrate dramatic changes in conditions unforeseen at the time of the decree that both render the protections of the decree unnecessary to effectuate the rights of the beneficiary and impose extreme and unexpectedly oppressive hardships on the obligor." T. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 Tex. L. Rev. 1101, 1110 (1986). While the *Swift* language may also support a modification when the original purposes of the injunction are not fulfilled,[11] the standard still constricts the district court's inquiry.

[10] Although *Swift* involved a consent decree, the Court asserted the same standards apply after litigation. Moreover, the Court applies no distinction to requested modifications of decrees sought by either plaintiffs or defendants. *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971).

> Placed in other words, this means for us that modification is only cautiously to be granted; that some change is not enough; that the dangers which the decree was meant to foreclose must almost have disappeared; that hardship and oppression, extreme and unexpected, are significant; and that the movants' task is to provide close to an unanswerable case. To repeat: caution, substantial change, unforeseenness, oppressive hardship, and a clear showing are the requirements.

Humble Oil & Ref. Co. v. American Oil Co., 405 F.2d 803, 813 (8th Cir.), *cert. denied*, 395 U.S. 905 (1969). Fed. R. Civ. P. 60(b) codifies this standard.

When the relief has been fashioned and the decree entered, "an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate." 64 Tex. L. Rev. 1101, 1105. For this reason, the court's jurisdiction extends beyond the termination of the wrongdoing, *Battle v. Anderson*, 708 F.2d 1523, 1538 (10th Cir. 1983), because an injunction seeks to stabilize a factual setting with a judicial ordering and *maintain* that condition which the order sought to create. The condition that eventuates as a function of the injunction cannot alone become the basis for altering the decree absent the *Swift* showing. *Securities and Exch. Comm'n. v. Jan-Dal Oil & Gas*,

[11] "*Swift* teaches that a decree may be changed upon an appropriate showing, and it holds that it may *not* be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248 (1968) (government sought modification of injunction to achieve purposes of original decree). *See* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2961, at 602-03 (1973).

Inc., 433 F.2d 304 (10th Cir. 1970). To do otherwise is to return the beneficiary of injunctive relief to the proverbial first square. It is for this reason that *Swift* remains viable.[12]

Thus, compliance alone cannot become the basis for modifying or dissolving an injunction. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *Jan-Dal Oil & Gas, Inc.*, 433 F.2d at 304.[13] Nor can a mere change of conditions alter the prospective ordering of relationships embodied by a permanent injunction. The party subject to the decree must establish by clear and convincing evidence that conditions which led to the original decree no longer exist, or the condition the order sought to alleviate, a constitutional violation, has been eradicated.[14] Until this showing is made, the decree stands.

Nevertheless, a permanent injunction empowered by a court's continuing jurisdiction does not presume that its underlying circumstances or the rights achieved remain static. "By its forward cast, an injunction contemplates change and must be sufficiently malleable to adapt the ordered relief to contemporary circumstances." *United States v. Lawrence County School Dist.*, 799 F.2d 1031, 1056 (5th Cir. 1986). Thus, while principles of res judicata may be applied to the factual finding of unitariness at the time the finding is made with the injunction in place, we have recognized that this past finding alone does not bar reconsideration of the decree. *Dowell*, 795 F.2d at 1519.

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[12] It is noteworthy that the original *Swift* decree, affirmed in 1905, *Swift & Co. v. United States*, 196 U.S. 375 (1905), was followed by a second decree in 1920 which was not dissolved until 1981.

[13] In *Jan-Dal Oil & Gas*, 433 F.2d at 306, we reversed the district court's dissolution of a permanent injunction upon finding defendant's proof established merely "short term compliance with the law." *Id.*

[14] Our case differs from *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 437-38 (1976), which found modification appropriate because "no majority of any minority" provision in the 1974 injunction was "contrary to the intervening decision of this Court in *Swann*."

In contending there should be a different standard employed in school desegregation cases, the dissent miscasts our basic premise. We do not imply perpetual supervision of public schools by federal courts, nor do we suggest the Board is incapable of complying with constitutional mandates. We take the simple position that an injunctive order entered in a school desegregation case has the same attributes as any other injunctive order issued by a federal court, and that it is binding upon all parties until modified by the court which entered the order in the first instance. We add, as the trial court initially recognized, the injunctive order can be modified or dissolved only upon a finding of changed conditions. In this context, the intent of the defendants has little, if any, relevance.

IV. Purpose of Injunctive Relief

In 1972, having found "the Defendant School Board has totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own," *Dowell*, 338 F. Supp. at 1271, the district court held that "[p]laintiffs are entitled to a decree requiring the reasonably immediate conversion of the Oklahoma City Public Schools into a unitary school system." *Id.* at 1272 (citations omitted). The Board was ordered not to alter or deviate from the plan without "the prior approval and permission of the court," and the order was made binding on the Board, "its members, agents, servants, employees, present and future, and upon those persons in active concert or participation with them." *Id.* at 1273.

The decree embodied the constitutional mandate to eliminate "root and branch" racial discimination enforced through a dual school system. *Green v. County School Bd. of New Kent County, Va.*, 391 U.S. 430, 437 (1968). The resulting terrain circumscribed by the injunction was later declared unitary upon the district court's finding certain components of unitariness to have been satisfied.[15] "[U]nitariness is less a quantifiable 'moment' in the history of a remedial plan than it is the general state of successful desegregation." *Morgan v. Nucci*, 831 F.2d 313, 321 (1st Cir. 1987); *see also Brown v. Board of Educ. of Topeka*, (No. 87-1668).[16] While a declaration of unitariness addresses the goals of injunctive relief, it alone does not sweep the slate clean.

Nor, in our view, does a finding of unitariness mandate the later dissolution of the decree without proof of a substantial change in the circumstances which led to issuance of that decree. *Dowell*, 795 F.2d at 1521; *contra United States v. Overton*, 834 F.2d 1171 (5th Cir. 1987); *Riddick v. School Bd. of Norfolk*, 784

[15] While the Supreme Court has defined neither the meaning of the term unitary nor the time and method of closing a school desegregation case, the Court has suggested that the elimination of "invidious racial distinctions" related to student assignment, transportation, support personnel, and extracurricular activities, and the school administration's concern for producing and maintaining schools of like quality, facilities, and staffs meet a threshold showing of unitariness. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971); *see also Ross v. Houston Indep. School Dist.*, 699 F.2d 218, 227-28 (5th Cir. 1983) ("Constructing a unitary school system does *not* require a racial balance in all of the schools. What is required is that every reasonable effort be made to eradicate segregation and its insidious residue." (citations omitted)). Professor Fiss has queried, "But what is a permissible basis for assigning students to schools under a 'unitary nonracial school system'? This seems to be the central riddle of the law of school desegregation." Fiss, *The Charlotte-Mecklenburg Case — Its Significance for Northern School Desegregation*, 38 U. Chi. L. Rev. 697, 700-01 (1971).

[16] The *Morgan* court defined unitary status as "a fully integrated, non-segregated system," 831 F.2d at 316, that is, complete desegregation "in *all* aspects of the . . . schools." *Id.* at 318.

F.2d 521 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986).[17] Until that showing, "those who are subject to the commands of an injunctive order must obey those commands, notwithstanding eminently reasonable and proper objections to the order, until it is modified or reversed." *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 439 (1976). It is imperative that the rights of the party for whose benefit an injunction has been entered are affected by no one unless a court determines the injunction in current form is no longer necessary to achieve the court's original objective. It is also imperative that when considering whether to vacate or modify an injunctive decree, the district court not retry "the original premises of the judgment; instead, any modification must be confined and tailored to the change in circumstance that justifies the modification." *Lawrence County School Dist.*, 799 F.2d at 1056. Necessarily, however, in conducting a factual inquiry into the changed conditions pled, the court must reexamine whether the underlying substantive obligations are preserved. *See* B. Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 La. L. Rev. 789 (1988).[18]

[17] The dissenting opinion, like that in *Overton*, 834 F.2d at 1171, confuses a trial court's jurisdiction to enforce its mandatory orders with the concept of finality. We agree that a federal district court should not attempt an interminable supervision over the affairs of a school district. Recognizing the inherent power to enforce prior orders, however, is not inconsistent with the objective of curtailing active supervision. Once the school district has achieved unitariness, the court's need for active jurisdiction ceases. Its power to enforce its equitable remedy, however, is born when the remedy is fashioned and does not die until the remedy expires. By upholding this power, we are not holding, as the dissent seems to suggest, that a district court retain post-remedy authority over a school district for any reason other than to enforce, modify, or vacate its decree. Thus, the dissent's suggestion that we have added a new dimension to the law by "retaining jurisdiction" over this case fails to recognize we add nothing to the district court's jurisdiction that it did not already possess.

[18] Professor Landsberg correctly points out that this "core issue of the substantive obligations of formerly *de jure* school systems which have successfully desegregated" has been overlooked in the judicial haste to restore school governance to local authority. 48 La. L. Rev. 789, 815 (1988). *See also* P. Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 Colum. L. Rev. 728 (1986).

V. Burden of Proof

A.

Nevertheless, in this case, unilaterally and without prior approval from the district court, as required by the injunctive decree, the Board implemented the Plan. It is uncontested that the contents of the Plan are contrary to the explicit dictates of the injunction. As we previously noted, the Board's action creates a "special circumstance which permitted plaintiffs to return to court and test the presumptions premised in the declaration of unitariness." *Dowell*, 795 F.2d at 1522. We so instructed the district court.

The first presumption we address, then, is whether the Board's Plan *maintains* the unitary status of the District since the injunction remained in effect when the Board restored neighborhood schools for elementary student assignments.[19] This presumption flows from the Board's continuing affirmative duty to "accomplish desegregation," *Swann*, 402 U.S. at 42, to attain "maximum practicable desegregation," *Morgan v. McDonough*, 689 F.2d 265, 280 (1st Cir. 1982), and to protect the constitutional rights of the class protected by the equitable remedy. *Keyes v. School Dist. No. 1, Denver, Colo.*, 609 F. Supp. 1491, 1515 (D. Colo. 1985). The remedy "must survive beyond the procedural life of the litigation." *Dowell*, 795 F.2d at 1521.

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[19] The dissent states: "Here, despite the school district's continued unitary status, this court retains jurisdiction and now orders the school district to racially balance the elementary schools which most certainly will require busing." Dissent at p.2. We are compelled to point out that the question of continued unitariness of the District so readily assumed by the dissent was the key factual controversy in this case. Moreover, *both sides* recognized conditions had changed since the entry of the injunctive order, thus clearly suggesting the incongruity between those changed circumstances and the facts which convinced the trial court the District was unitary. Whether the District was unitary before circumstances changed is irrelevant to whether the decree should be amended or vacated. Indeed, whether the District remains unitary in light of changed circumstances is a wholly different question. Finally, our focus is upon the issue of desegregation. How that objective will be reached must be left first to the Board's judgment, and we will not engage in shibolethic speculation.

That thirty-two of the sixty-four elementary schools in Oklahoma City emerge from the Plan as one-race majority schools not only establishes a prima facie case that the decree has been violated and the presumption of unitariness challenged, but also satisfies plaintiffs' burden in reopening and shifts the burden to defendants to produce evidence of changed circumstances or oppressive hardship.

> [I]n a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition . . . The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

Swann, 402 U.S. at 26. The Board bears a "heavy burden" to show that its implementation of the Plan does not "serve to perpetuate or re-establish the dual school system." *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979) (quoted in *Clark v. Board of Educ. of Little Rock School Dist.*, 705 F.2d 265, 271 (8th Cir. 1983)). This burden is not alleviated after a finding of unitariness when the decree remains in place but is focused on the *Swift* inquiry whether "anything has happened that will justify us now in changing a decree." 286 U.S. at 119.

The Board sought to prove that substantial demographic change in the District established new conditions that were unforeseen at the time the decree was instituted and which now produced "hardship so 'extreme and unexpected' as to make the decree oppressive." *Equal Employment Opportunity Comm'n v. Safeway*, 611 F.2d at 800 (quoting *Swift*, 286 U.S. at 119). While the record sets forth changed circumstances not unlike those contemplated by *Swann*, it fails to estab-

lish "the dangers the decree was meant to foreclose must almost have disappeared." *Humble Oil & Ref. Co.*, 405 F.2d at 813.

B.

In its factual findings, the district court relied on relocation statistics offered by defendants' experts, Drs. Clark and Welch. Although Dr. Clark's evidence indicated black families had relocated within and outside of the District,[20] he conceded that his examination focused only on seven inner-city tracts and not on additional predominantly black residential tracts to the north of the studied area. (R. II, 93-94). While Dr. Clark's study establishes there is a substantial decrease in black population in these particular tracts, it reveals the same decrease for *total* population.[21] Both on direct and cross-examination, Dr. Clark stated that the area encompassing the seven tracts underwent "land use transition," (R. II, 68) and that construction of interstate highways, I-40 and I-35, and developments in institutions, notably the hospital complex, had "dramatic impact" on population movement in some of the studied tracts.(R. II, 68).

Based on this testimony, the court concluded there was "a substantial amount of turnover in the black population residing in the east inner-city tracts." *Dowell*, 677 F. Supp. at 1507. This conclusion is also premised on metropolitan census data compiled from completion of a long census form. While the long census form asks the respondent whether he or she lived in the same house five years before, it does not determine whether the respondent moved out of the

[20] Dr. Clark produced relocation statistics for black families with kindergarten children, 1974-75 to 1977-78, and black families with children in three grade levels, 1982-83 to 1984-85. The results are visualized in Def. Exs. 7 and 8.

[21] The court's order reproduced only the figures for black population. Defendant Exhibit 5D, on which the court relied, also represented "total population" figures for the studied tracts.

District or merely down the street. The basis for the turnover[22] rate is thus incomplete, rendering the census form suspect.[23]

Using census figures, Dr. Clark calculated that the percentage of black population residing in these tracts in Oklahoma City between 1960 and 1980 decreased by 67.2%.[24] Despite his statement about external forces affecting population movement, Dr. Clark concluded that "private preference" was the chief motivating factor in determining where people chose to live.[25] (R. II, 113). Dr. Clark observed the "strong disinclination" of whites to move into predominantly black neighborhoods and their coincidental inclination to move out of neighborhoods that become 25 to 30% minority. (R. II, 105). He conceded that majority black areas would then be unlikely to change unless the black population moved elsewhere. (R. II, 106).

The district court thus observed, "Some blacks were choosing to live within the area and others were choosing to move away. (Tr. 71)." 677 F. Supp. at 1507.

The district court also relied on the testimony of Dr. Welch who presented statistical analyses of the racial composition of residential attendance zones in the District from 1972 to 1986 and then used these figures to project racial composition in 1995. Based on Dr. Welch's calculations, the court noted that "the exposure of blacks to non-blacks almost doubled." 677

[22] The district court noted that "turnover" refers to persons who did not live in the same house five years previously.

[23] In *Keyes v. School Dist. No. 1, Denver, Colo.*, 609 F. Supp. 1491, 1508 (D. Colo. 1985), the district court rejected evidence of demographic change based on the long census form because of its omission of key information and incomplete sampling.

[24] "In 1960, 81% of all blacks residing in the Oklahoma City metropolitan area lived within these tracts. In 1980, however, only 16.8% of the total black population in the metropolitan area lived in this area." 677 F. Supp. at 1507.

[25] Dr. Clark stated that his use of the term "preference" does not preclude the element of prejudice. (R. II, 113).

F. Supp. at 1508.[26] Embracing Welch's analysis which included a ranking of the 125 school districts he had studied, the court declared, "the Oklahoma City school district experienced the eighth largest reduction in the index of dissimilarity or, in other words, the eighth greatest improvement in integration, during the period from 1968 to 1982 (Def. Ex. 27; Tr. 130-31)." 677 F. Supp. at 1508.[27] The court noted that "[e]ven after implementing the K-4 neighborhood school plan, the degree of overall dissimilarity among the races attending school in Oklahoma City was less than that of Tulsa, Oklahoma, whose index was .557. (Def. Ex. 38)." 677 F. Supp. at 1508.[28] Similarly, the district court relied on a comparison of the District figures following implementation of the Plan with figures from other "unitary districts in the country."[29] Noting the change

[26] Dr. Welch utilizes the terms "dissimilarity index" and "exposure index" to express these ratios. The former represents the distribution of the races in an area, while the latter indicates how well a school system is integrated based on the same two-group comparison, whites and non-whites. He then postulates that a dissimilarity index of .00 signifies a maximally integrated population while an index of 1.0 represents a segregated population. The exposure index reverses the ratio with .00 representing the most segregated population and 1.0 the most integrated neighborhoods. Dr. Welch's study relied principally on the dissimilarity index. "We do not use the exposure index very intensively in the study." (R. II, 130).

[27] Dr. Welch stated on direct examination that the study of the dissimilarity index used in this comparison included 1968 to 1982 and did not show the dissimilarity in the District after implementation of the K-4 Plan in 1985. (R. II, 132). The inevitable conclusion, then, is that the achievement of integration in the District was the consequence of the adoption of the Finger Plan.

[28] Plaintiffs' objection to the admission of this comparison without any foundation was overruled on the ground it could show "some school boards are less attentive to the problem or more attentive to the problem than others." (R. III, 195-96). Nevertheless, the court utilized this comparison as substantive evidence of the impact of the Plan on the degree of "overall dissimilarity among the races." 677 F. Supp. at 1508.

[29] The court's analysis is based on Def. Ex. 39, a list of 117 school districts declared unitary according to a Justice Department press release. In response to Dr. Welch's statement that he had not verified the list (R. III, 280), the court agreed to take judicial notice of *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1413-14 (11th Cir. 1985), which called the accuracy of part of the list into question.

in the dissimilarity index from .78 prior to implementation of the Finger Plan to .24 in 1984, the district court stated "the index rose *slightly* to .38" in 1985 with the reintroduction of neighborhood schools. 677 F. Supp. at 1509. Contrary to the district court's characterization, the rise in the index represents a 58% increase in the ratio of blacks to non-blacks. Despite this expansion of dissimilarity, the court concluded the "increased residential integration in Oklahoma City has resulted in a much lower level of dissimilarity today in the neighborhood elementary schools (.56) than existed in 1971 before the Finger Plan was implemented (.83). (Def. Ex. 44; Tr. 187)." 677 F. Supp. at 1509.

On the basis of Def. Ex. 20, two graphs plotting enrollment figures for the District for white, black, and non-black minority students, grades K-12, the court concluded "the student body is truly multicultural."[30] 677 F. Supp. at 1509. Nevertheless, the court acknowledged the Plan created "some schools," eleven, which are 90%+ black but observed "the plan created *no* schools which are 90% or more white." *Id.* at 1510. The Plan, however, created twenty-one schools that had less than 10% black student enrollment.

The district court does not address contrasting evidence in the record. Unmentioned by the court is plaintiffs' cross-examination of Dr. Welch which produced testimony directly controverting that of Dr. Clark[31] and undermined the method employed to create the figures the Board relied on to represent substantial demographic change and the oppressiveness of the decree. Noting that he used two different methods for calculating the 1974 to 1986 figures and the 1986

[30] In 1986, whites comprised 47%, blacks 40%, and non-black minorities 13% of the District's enrollment.

[31] For example, on the basis of his calculations, Dr. Welch projected the black population in the District for 1995. (Def. Ex. 11). The projection represented areas between 92.3% and 100% black, becoming somewhere between 89.6% to 93.2% black. Dr. Welch stated the projections suggest whites will move into the area. (R. III, 252-53).

to 1995 figures, Dr. Welch conceded: "And I really didn't want an inconsistent forecast. I thought someone would be cross-examining me. And so I designed the procedure to be completely internally consistent." (R. III, 244). His numbers, he stated, were "guesstimates." (R. III, 246).

In addition, the court does not reference the testimony of Dr. Yale Rabin, plaintiffs' expert in population distribution. Using U.S. Census data, Dr. Rabin compared and analysed the black population in the District between 1950 and 1980. According to these census tract figures, the black population expanded from one tract in which approximately 25% of the District black population resided, to sixteen tracts 75%+ black, including 60.8% of the District's black population. He explained that as the area expanded spatially from one tract in 1950 to six tracts in 1960, thirteen tracts in 1970, and sixteen tracts in 1980, each expansion included the original all-black tracts. (R. VII, 1125-31). Dr. Rabin controverted Dr. Clark's conclusion that the black population had dropped to 16.9% in 1980 in the six tracts. "[T]he area of concentration itself has changed, and it's misleading to refer, in each successive decade, to the same six tracts as the area of concentration." (R. VII, 1133). Dr. Rabin not only recognized the substantial population displacement caused by institutional and highway development but focused the effect of Def. Exs. 7 and 8, maps showing the numbers of black families and general direction of movement in and out of the District. For example, Dr. Rabin noted that while 46 families moved into white areas from the northeast quadrant from 1974 to 1978 (Def. Ex. 7), many thousands of blacks live in the subject tracts, thus putting the significance of the turnover numbers into perspective. (R. VII, 1157). In fact, the more predominant population shift, 148 families, was within the northeast quadrant.

Most importantly, Dr. John Finger, plaintiffs' expert, underscored that the Board's statisticians had "changed the rules." (R. VIII, 1207). He explained,

> There will be no schools that have less than ten percent minority, but there will be schools that have less than ten percent black. How you label these as segregated or not is what the words mean, and segregated has always been a difficult word.

(R. VIII, 1208).

Permeating the testimony on demographic change were sharply contrasting views on the impact of busing on children of "tender age." 677 F. Supp. at 1526. Numerous lay witnesses and District personnel testifying on behalf of the Board generally stated that busing young children had an adverse, emotional impact on the child.[32] Defendants' expert witness, Dr. Herbert Walberg, a research professor at the University of Illinois, offered a study he completed showing that black children who were transported to school tested lower than black children who did not ride a school bus. Plaintiffs' witness, Dr. Robert Crain, who was qualified an expert on school desegregation, stated that Walberg's study was "absolutely indefensible" because it omitted critical covariant factors like socioeconomic status in the analysis. (R. VII, 1008). Dr. Crain stated that in light of the fact that half of all public school students ride a school bus and that only 5% of those children are bused for desegregation purposes, the evidence of the harmful effects of trans-

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[32] For example, counsel for the Board asked plaintiffs' expert, Dr. Foster, if busing young children would be potentially more difficult because "they're not fully developed." (R. VIII, 1367). The court asked one witness if, in her opinion, K-4 children are too young to be bused. (R. III, 338). Mrs. Clara Luper, a teacher at John Marshall High School, stated that her daughter was "excited about riding the bus." (R. IX, 1403). Testimony on busing distances tended to be based on estimates of time and mileage, not actual routing distance. *See*, e.g., R. V, 705.

portation on student achievement and emotional development is suspect. The district court did not reference plaintiffs' evidence on this issue.

C.

Based on the divergent testimony on demographic change, the court concluded the Board had not taken action to cause or contribute to presently existing residential segregation but "[i]f anything, the action of the Board of Education, through implementation of the Finger Plan at all grade levels for more than a decade, have [sic] fostered the neighborhood integration which has occurred in Oklahoma City." 677 F. Supp. at 1512. Previously, in summarizing the relocation statistics, the court observed, "These relocation studies reveal the compulsory busing of black children to a certain area does not have any appreciable affect [sic] on where their parents choose to relocate. (Tr. 76-77)." 677 F. Supp. at 1508.

That demographic change of some degree occurred within the District after the Finger Plan was instituted is apparent. As *Swann* observed, "It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so." 402 U.S. at 31. Nevertheless, we are reluctant to hitch the preservation of hard-won constitutional rights to numbers alone. "Unitary status is not simply a mathematical construction." *Morgan*, 831 F.2d at 321. As the district court observed in *Keyes v. School Dist. No. 1, Denver, Colo.*, 609 F. Supp. at 1516, "The expert testimony in this case concerning the use of racial balance and racial contact indices, and the differing conclusions reached by the experts called by the respective parties, demonstrate once again the facility with which numerical data may be manipulated and discriminatory policies may be masked." In Oklahoma City, the sum total of all of the numbers immutably underscores the emergence of eleven all-black elementary schools

and twenty-one 90%+ white and non-black minority schools, roughly half of the District's elementary schools, with the reinstitution of neighborhood black schools for the elementary grades. In fact, when the actual numbers of children attending District elementary school are run, the result is even more dramatic. Of the approximately 6,464 black students[33] attending the District's elementary schools K-4, 2,990 or 46.2% of all black elementary children in the District attend the eleven 90%+ black elementary schools.[34]

D.

Similarly, we are unable to conclude that these same numerical calculations support a finding that the Finger Plan became a hardship "extreme and unexpected," *Humble Oil & Ref. Co.*, 405 F.2d at 813, because of the unintended impact of the stand-alone schools. This hardship was projected to arise if a school became stand-alone, necessitating busing black students, who had been bused into that school, even greater distances to attend an integrated school. With more students attending naturally integrated K-5 schools, the 5th-year centers in the black community would then have to close.

As viewed by the district court, the creation of Bodine Elementary School in southeast Oklahoma City as a K-5 stand-alone caused the Board to focus on the "perceived inequities" of the stand-alone feature. 677 F. Supp. at 1513. According to the minutes of the Board meeting which addressed the question of mak-

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[33] This total number includes the Star-Spencer area which was already treated differently under the Finger Plan because of its geographic separation from the District.

[34] These calculations are based on plaintiffs' Exhibit No. 26, Membership by School, Race and Grade, K-4 Elementary Schools. The District's data processing department generated the enrollment figures.

ing Bodine a K-5 rather than a K-4 stand-alone,[35] Board members voiced several concerns over the process of deciding which schools qualified and became stand-alone. (Def. Ex. 76). Dr. Clyde Muse, a black Board member, objected that the creation of Bodine stifled growth in the northeast quadrant and was yet another example of "a concerted effort to see to it that not only will the black community or the northeast quadrant not integrate, there also seems to be a concerted effort on somebody's part to see that it always remains impoverished." (Def. Ex. 76 at 349). Dr. Muse lamented the inevitable closing of schools in the northeast quadrant and urged the District undertake a study to determine what changes had occurred that could result in a more equitable plan for the District rather than the apparent piecemeal approach. *Id.* Another Board member, Ms. Jean Brody, urged the District to undertake a comprehensive study to avoid what she perceived as random planning that resulted in Bodine's becoming a K-5 stand-alone, but postponed Rockwood Elementary School's becoming stand-alone although it fully qualified and had the capacity to become a K-5 school.[36]

In voting to make Bodine a K-5 stand-alone, the Board rejected the advice of Dr. Paul Heath, a board member, that the K-5 concept was educationally unsound and would ultimately adversely impact the entire District. Of concern to participants at the meeting was the fact that in going to K-5 status, Bodine fifth graders would give up the opportunity to participate

[35] Prior to Bodine's designation as a K-5 stand-alone, only two other K-5 stand-alones operated in the District. Horace Mann Elementary School became a K-5 facility when the Finger Plan was implemented. Arcadia was considered a K-5 stand-alone "based on different criteria" and was treated differently because of its isolated location. (Def. Ex. 76).

[36] Before making Bodine stand-alone, the Board had agreed to add four classrooms because of capacity problems at the school. Until the addition was finished, however, 14 portable structures were necessary to solve the overcrowding. Even with the new addition, the Board estimated that 5 portables would still be needed. (Def. Ex. 76).

in special programs like strings and visual arts offered at the 5th-grade centers. (Def. Ex. 76). On the positive side, however, student reassignments necessitated by making Bodine stand-alone were not expected to impact the existing 5th-grade centers. (Def. Ex. 76).

Similarly, the trial testimony on the hardship of stand-alone schools echoed some of those concerns and underlined that the Board's planning was based on theoretical conjecture, speculative forecasting, and discretionary decision making. At the outset, Dr. Welch noted that of the eleven stand-alone schools open in 1972, only three retained this status in the District in 1984.[37] (R. III, 289). The projected number of stand-alones was tied to Dr. Welch's 1995 District calculations. A senior researcher for the District, who monitored student assignments and helped prepare projections on stand-alones, stated that although ten schools were eligible for stand-alone status, only three were then stand-alone. He stated that in order to create a stand-alone, the eligible school had to have the capacity to absorb the increased number of students. (R. IV, 495-96); *see also* Def. Ex. 69. Internal Board memoranda also addressed the possibility of creating additional stand-alones by altering attendance boundaries, exploring reassignment options,[38] and opting for either K-4 or K-5 stand-alones. (R. IV, 498). Dr. Finger stated that the original plan anticipated making as many schools stand-alone as qualified even if some busing distances increased. "But, . . . these things get to be political." (R. VIII, 1201). The 5th-grade centers, he stated, were considered temporary and were designed to be incorporated into the middle schools.

[37] Overcrowding (Edgemere) and loss of racial balance caused eight schools to lose their stand-alone status. However, three K-4 stand-alones, Harrison, Edgemere, and Western Village, remained stand-alone. (Def. Ex. 76).

[38] Student assignments were constrained by Policy JC which prohibited reassignment of students who had been reassigned within the prior three years. (Def. Ex. 70).

The stand-alone feature, thus, emerged from the evidence as a matter of speculation tied to capacity problems, budget constraints, and local politics. Nevertheless, it was the cornerstone upon which advocates of the need to modify or dissolve the Finger Plan built their claim of hardship.

VI. Impact of Plan on Modification

A.

We are satisfied the evidence reveals that because of population shifts in the District, it was necessary to modify the Finger Plan. It is within the court's equitable power to modify the Finger Plan to mirror these changed circumstances, to retain the unitariness of the District, and reflect the Board's continuing duty under the decree. Just as the court can tailor the relief to modification, so too can it dissolve the injunction upon finding "that what it has been doing has been turned through changing circumstances into an instrument of wrong." *Swift*, 286 U.S. at 114-15. Unfortunately, the district court perceived this duty entirely in terms of the Board's alleged discriminatory intent in adopting the Plan. This perception overlooks the essential point. Given the changes that emerge from all of the evidence presented, the court must determine whether the Plan ameliorates those conditions. Dissolution is appropriate only if the evidence unmistakably reveals the Plan encompasses the changed circumstances and maintains the continuing prospective effect of the decree.

Again, to undertake this analysis, the court must direct its attention to "the question of the withdrawal or modification of injunctive relief granted in the past . . . where the Cardozo [*Swift*] precepts are the operating guidelines." *Humble Oil & Ref. Co.*, 405 F.2d at 814. Thus, while the Board's motive may be one circumstance in evaluating the effect of the Plan, it is only an element affecting the ultimate decision. An unimpeachable motive cannot obscure the essential question, does the Plan relieve the effects of changed circumstances and potential hardship? Only a positive response will merit dissolution.

B.

The issue then becomes whether the Board's action in response to the changed conditions has the effect of making the District "*un*-unitary" by reviving the effects of past discrimination. The new Plan must be judged in light of the old plan to assure it mirrors actual changes in the District without so radically departing from the original decree that the rights secured by that decree are vitiated.

Swann guides our review in this inquiry by focusing our attention on the Board's continuing duty to remedy the effects of past discrimination until "it is clear that state-imposed segregation has been completely removed." 402 U.S. at 13; *see also Columbus Bd. of Ed. v. Penick*, 443 U.S. 449 (1979).[39] The inquiry into whether the Plan maintains unitariness in student assignments may concretely be directed to evaluating (1) the number of racially identifiable schools; (2) the good faith of school officials in the desegregation effort and running the schools; and (3) "whether maximum practicable desegregation of student bodies at the various schools has been attained." *Morgan*, 831 F.2d at 319. *See also Brown v. Board of Educ. of Topeka*, (No. 87-1668); *Ross v. Houston Indep. School Dist.*, 699 F.2d 218, 227 (5th Cir. 1983) ("[T]he decision that public officials have satisfied their responsibility to eradicate segregation and its vestiges must be based on conditions in the district, the accomplishments to date, and the feasibility of further

[39] *Swann* envisioned stability "once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." 402 U.S. at 32.

measures.").[40] No one factor is dispositive of the determination that unitariness is preserved. However, once dismantled, the dual school system should remain dismantled.

Thus, we are troubled because the evidence indicates the Board's implementation of a "racially neutral" neighborhood student assignment plan has the effect of reviving those conditions that necessitated a remedy in the first instance. Under these circumstances the expedient of finding unitariness does not erase the record or represent that substantial change in the law or facts to warrant overlooking the effect of the Board's actions.[41]

C.

The district court was satisfied the Plan was adopted to remedy the increased busing burdens on young black pupils, avoid closing 5th-year centers in the northeast quadrant, and eliminate the inequities of stand-alone schools. Despite the emergence of one-race elementary schools, the court found the Plan did not disturb the District's unitariness. The district court concluded that unless the Plan was adopted with discriminatory intent, a neighborhood school plan that has the effect of creating one-race schools is not constitutionally infirm.

To reach this conclusion, the court examined the remaining components of the Plan. While school faculties were not in perfect racial balance, particularly in the 90%+ black elementary schools, the court found that negotiated agreements with the teachers' union and teacher preference and seniority accounted for the imbalance and not Board policy.

The court did not address plaintiff's exhibits 48, 50, 52, and 54. The exhibits compare elementary school enrollment with the racial composition of faculty from 1972 to 1986-87 and reflect the growing parity of imbalance between faculty and students. By 1986-87, the 90%+ black elementary schools are staffed by predominantly black teachers.[42] Although the executive director of personnel testified that especially after 1985,[43] teacher assignments would comply with the District's affirmative action goal of 36.9% with a 10% variance factor, the numbers belie the aspiration.

Nevertheless, the court was satisfied that recent Board action would "bring[] elementary faculties into racial balance in 1987-88," 677 F. Supp. at 1519, based on the statement of the District's affirmative action program planner. However, the record fails to support this conclusion with any specific evidence of change to overcome plaintiffs' documented countertrend.

The district court believed that other factors in the equation maintained the District's unitariness and offset the racial imbalance in the elementary schools.

[42] For example, in 1986-87, at Edwards Elementary School, which is 99.5% black, the faculty is 70% black. At Rancho Village Elementary School, which has a 10.6% black student population, there are no black teachers. (Pl. Ex. 54). In 1972, the Edwards' faculty was 15% black; Rancho Village's faculty was 23% black. (Pl. Ex. 48).

[43] According to the witness, after the Plan was implemented, teachers with seniority were permitted to choose their teaching assignments. As a result of individual preference, many of the faculties became imbalanced. (R. IV, 555). In fact, prior to the Plan's implementation, Board member, Ms. Jean Brody, voiced her concern that the current teacher agreement was negotiated "without the knowledge that schools might be changed around." Def. Ex. 2.

Of prime importance was the majority-to-minority transfer option which represented to the court that "parents in Oklahoma City today have a choice. No pupil of a racial minority is excluded from any school in Oklahoma City on account of race." 677 F. Supp. at 1523. The record does not support this assertion. In fact, there is little evidence to determine the effectiveness and utilization of the transfer option. Dr. Belinda Biscoe, an administrator in the department of support programs, testified that letters were sent after the Plan was implemented informing parents of the M & M option, but no follow-up was done. Dr. Biscoe expressed the concern, apparently voiced by the District superintendent, that parents needed more information about the option. (R. III, 327). Asked if the Board had studied the program to determine who was exercising the transfer option, Dr. Biscoe answered that she did not believe the numbers had been analysed. (R. III, 327). Dr. Betty Mason, the assistant superintendent of high schools, agreed that the M & M policy could not serve to desegregate the schools in the northeast quadrant (R. V, 609) and was limited by the capacity of the receiving school. Although Dr. Finger acknowledged the M & M option might work if parents understood the alternative and were willing to exercise it, he observed that often those children who most need desegregated schools would be "the least likely to take that option." (R. VIII, 1196). Another defense witness believed the transfer option was available for "convenience." (R. VI, 837). There is simply no other evidence in the record to support the court's conclusion that parents understand the availability of the option and freely exercise it. Indeed, the court's analysis of the figures indicating 332 parents exercised the option the first year of the Plan and 181 the following year suggests otherwise. 677 F. Supp. at 1523.

Likewise, the effect of the Board's desire to maintain the District's unitariness by implementing programs like Effective Schools, Student Interaction,

Adopt-A-School, and the position of Equity Officer is equally undocumented. The District's Effective Schools program incorporates educational aspirations and attempts to translate those values into enhanced student achievement. (R. VI, 918-19). Although the court hailed a 13% decrease in the gap between black and white achievement test results in the District as evidence that the Effective Schools program was working, the test comparisons are flawed. The group of students studied one year is not the same studied the next year. (R. V, 744); *see* Def. Ex. 185. While there appeared to be some gain in achievement at eight of the 90%+ elementary schools as measured against the national average, scores at two 90%+ schools dropped. (R. VI, 942). More significantly, the meaning of the gain was not clear.[44] Additional testimony established that the Effective Schools program is geared to the upper grades (R. VII, 1004-05) and tied to budgetary constraints experienced by the District. (R. VI, 881). While the testimony was consistent that the concepts of "Effective Schools" and desegregated schools are not mutually exclusive, (R. V, 693) Board witnesses suggested that increased expenditures for busing would necessarily cut into the Effective School's budget. (R. VI, 944). Most importantly, there is no evidence of specific educational programs designed for those racially identifiable elementary schools to counteract the effect of concentrating low achievement in these schools.

The Board designed the Student Interaction Plan to pair schools 90%+ black with schools that do not have significant racial minority populations. (R. IV,

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[44] Dr. Finger observed that gain is an elusive concept, noting that "how much you can gain depends upon — on where you start . . . . It's easier to gain at the lower level — lower part of the scale than it is the higher part because the items are easier." (R. VIII, 1191). Dr. Carolyn Hughes, the assistant superintendent for curriculum and program development, stated that the District had undertaken to study the achievement gap using a method she called "the disaggregation of test data" which would look at "the disproportionality in achievement by race and socioeconomic level and gender." (R. V, 691).

394-95). Teachers were encouraged to bring students together two to four times a year and "to allow children to write letters to each other; to send video cassettes of themselves . . . to have the children read the same literature." (R. IV, 395). Although the program was discretionary with each classroom teacher, the Board hoped that perhaps nine to twelve hours a year would be devoted to the Interaction plan. (R. IV, 407). In contrast, plaintiffs' witness, Dr. Crain, rejected the value of student interaction based on exchanges of letters and infrequent visits to a paired school.[45] Meaningful interaction, he suggested, took place on a school athletic team or in a boy scout troop.

When the Plan was adopted, an Equity Committee chaired by an Equity Officer[46] was established to oversee the District and assure that facilities and equipment were relatively equal throughout the District. While the Board could be responsive to small dollar equipment adjustments (R. VI, 840) or building maintenance problems (R. VI, 834) recommended by the committee, its ability to effect a "major facility repair" or reduce overcrowding, for example, at a predominantly black 5th-year center, was constrained by funding reductions in the District and the consequent need to seek a bond election. (R. III, 370-72).

Similarly, the Adopt-A-School program, "a partnership between the public sector and the private sector," (R. V, 716) to provide resources, speakers,

[45] Pressed on cross-examination to explain why he didn't believe social interaction outside of school was beneficial, Dr. Crain was asked if he thought taking black children to a shopping mall to see white children or going to a movie theatre, "rubbing elbows at the candy counter, wasn't beneficial." Defense counsel then suggested that such contacts might be beneficial to blacks to "allow them to become socially acceptable when they . . . get out of school." (R. VII, 1093).

[46] The Equity Officer, who reported to the superintendent, was "responsible for monitoring the implementation of the District's student assignment plan" and making "recommendations that will maintain equity of educational opportunity to all students in all schools." Def. Ex. 3.

tutors, and money to community schools, does not counteract the imbalance created by the reinstitution of neighborhood schools. Like the considerable testimony about the increased participation of District parents in school PTA-PTO groups,[47] this evidence does not substitute for the constitutional mandate to maintain a unitary school system. In other words, while each program is laudable in principle and addresses a particular educational or community value, the program does not ameliorate the condition created by the Plan, the emergence of thirty-two effectively one-race schools.

D.

Although the court accepted the statements of school personnel and community members who "unequivocally testified that in their opinion the Board's K-4 neighborhood school plan was not discriminatory and did not result in the recreation of a dual school system," 677 F. Supp. at 1519, the quest for discriminatory intent is not so straightforward.[48] Indeed, the

[47] While the evidence established a substantial increase in parent participation in PTA-PTO, there was conflicting evidence on whether the District itself increased its commitment to generating parent involvement in the schools when neighborhood schools were reinstituted; how and what records were maintained to document parent participation prior to 1985; and what factors contributed to lack of parent participation — negative attitudes toward the schools, economics, etc. We are troubled by the nature of some of the evidence on which the court relied. For example, when asked about the decline in parental involvement in the schools prior to the 1970's and early 1980's, Dr. Betty Mason, the assistant superintendent of high schools, responded, "Again I have to give you the benefit of the discussions I have had with persons in the district as well as some of the readings that I have done . . . " (R. V, 610). When plaintiffs' objected to the testimony about to be elicited, the court overruled the objection on the ground that the statements were not hearsay but "important evidence for both sides." (R. V, 610-11).

[48] The court was generous in its praise, viewing it as "significant that the Board has elected to employ intelligent and competent black individuals in upper-echelon central office administrative positions." 677 F. Supp. at 1519. School facilities "are not discriminatory . . . [s]ince most of the predominately black schools today served as 5th-year

court asked various witnesses, lay and expert, if they believed the Plan was adopted with discriminatory intent.[49] One witness was asked if he believed the court should continue its supervision of the District. (R. VI, 953). Thus assured, the court concluded the Plan retained the District's unitariness and, in fact, enhanced it by fostering a greater degree of parental and community involvement in the schools. In light of this conclusion, the court wholly rejected plaintiffs' assertion that the Plan's incorporation of the same attendance zones used prior to the Finger Plan was evidence of the Board's discriminatory intent. Citing

centers under the Finger Plan . . . and expenditures made by the Board for the students in the predominately black elementary schools is [sic] greater than that made in the elementary schools with a black population of less than 10%." *Id.* at 1519.

[49] Plaintiffs' counsel objected to the court's questions. (*See, e.g.*, R. IV, 530; R.V, 619, 681, 695; R. VI, 860.) After one exchange between the court and Mrs. Betty Jo Hill, president of the Board, plaintiffs' counsel interjected his concern over the court's asking the witness if the schools were being operated as a unitary system and if the Plan altered the unitariness.

> The Court: Well, this is a question that the court's got to answer.
>
> Counsel: I certainly agree with you, and I think that it a question for the court to answer. It's a question of law. It's one of the questions that the Tenth Circuit has indicated that the court must respond to. And I don't think —
>
> The Court: How could I respond to it unless I know what the evidence shows?
>
> Counsel: Well, with all due respect, I don't believe that it's an appropriate legal question to ask the opinion of a lay witness, and particularly a school board member, about.
>
> The Court: Well, she's had eleven years of the school board activities, and that should almost — in my opinion does make her somewhat of an expert. (R. IV, 530).

The question, and those of the same nature repeatedly asked by the trial court, invited incompetent evidence. None of the witnesses was qualified to express either his opinion regarding the intent of the Board or whether the District was unitary. The question of intent is one for the trier of fact to decide from circumstantial evidence. The issue of unitariness is a matter which only the court can decide. To say that answers given to these questions provided proper foundational evidence for the trial court's findings ignores Fed. R. Evid. 701 and suggests surmise will satisfy a party's burden of proof.

Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977), the court responded that *"discriminatory intent may not be inferred solely from the disproportionate impact of a particular measure upon one race."* In so concluding, the court narrowed its focus and overlooked the broader inquiry mandated by *Swann*.

Indeed, discriminatory intent cannot be ascertained by eliciting opinion testimony from witnesses, often out of context[50] and accumulating those responses as substantive evidence of the motive for the Plan. "Ordinarily, only circumstantial evidence is available to establish segregative intent." *Diaz v. San Jose Unified School Dist.*, 733 F.2d 660, 662 (9th Cir. 1984). In *Keyes v. School Dist. No. 1, Denver, Colo.*, 670 F. Supp. 1513 (D. Colo. 1987), the court stated:

> [S]ome discriminatory intent must be shown to prove a violation of the constitutional requirement that educational opportunity must be equally available. That intent is not, however, measured by the good faith and well meaning of individual Board members or of the persons who carry out the policies and programs directed by the Board. The intent is an institutional intent which can be proved only by circumstantial evidence.

Id. at 1516.

We also agree that neither "the foreseeability of segregative consequences" alone nor the emergence

[50] Defense counsel asked plaintiffs' expert, Dr. Mary Lee Taylor, if the Plan was adopted with discriminatory intent. The question followed her extensive direct testimony on the impact of institutional racism over time and the effect of the Finger Plan's unlinking many of those discriminatory patterns. Defense counsel then asked, "Based upon your educational background and your experience and your review of the facts in this case, *you don't feel* that the Oklahoma City Board of Education adopted this neighborhood plan with the intent to discriminate against blacks, *do you?*" (Emphasis added.) Dr. Taylor responded, "I have no evidence of that at all. I did not mean to suggest it." (R. VIII, 1236). Although the question is a non sequitur, the court cited her response to support its conclusion there was no discriminatory intent.

of one-race schools alone establishes a prima facie case of purposeful racial discrimination. *Dayton Bd. of Educ.*, 443 U.S. at 536, n.9. We must look at other circumstantial evidence, "the historical background and specific sequence of events leading up to the Board's actions maintaining or exacerbating ethnic imbalance in the district schools." *Diaz*, 773 F.2d at 663 (citation omitted).

Swann directs "an assignment plan is not acceptable simply because it appears to be neutral." 402 U.S. at 28. The Court stated:

> [S]uch [neutral] plans *may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation.* When school authorities present a district court with a "*loaded game board,*" affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-discriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.

Id. (emphasis added). Within the context of the finding of unitariness, the Plan must be judged by its effectiveness in maintaining unitary status. *Davis v. Board of School Comm'rs of Mobile County*, 402 U.S. 33, 37 (1971). Thus, under *Swann*, we must total all of the evidence to decide if the district court correctly found the Plan maintained unitariness in student assignments.[51]

[51] In our analysis, we have declined to mire the legal issues with extensive examination of the conflicting evidence on the question of the effect of integration on student achievement. The dissent wades into this area, citing the testimony of Dr. Sampson, the Board's rebuttal witness, who had compared the achievement of blacks at six all-black parochial schools in the Chicago area to that of black students at Chicago public high schools. Based on this study, Dr. Sampson was asked if black students must be in a classroom with white students to learn effectively. He responded that an "effective schools program" and a dedication to education encompassed by positive socioeconomic conditions assured black student achievement. When asked on cross-examination if intentional segregation of the public schools is harmful, Dr. Sampson responded that it didn't have to be and certainly wasn't for those blacks going to the parochial schools he studied in Chicago. Who could disagree when we compare a self-selected private parochial school setting to a large urban public school. The court, however, used this evidence, comparing the 65% dropout rate of Chicago public high schools to the 80-90% rate of these parochial students who then attend college, to conclude "the racial composition of a school has absolutely no effect on the academic achievement of its students." 677 F. Supp. at 1524. Although we remain uncertain what this testimony was intended to rebut in the first instance, we are certain it cannot represent evidence of the District's commitment to maintain a unitary system.

It is on this basis that we conclude the district court clearly erred in its findings of fact and consequent legal determinations. While we recognize the dedicated care and tireless, patient effort with which the court has managed and overseen this case, we cannot abandon our obligation to review all of the evidence. Thus, although there is evidence to facially support the district court's findings, *on the entire evidence* we are "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Because the court failed to address or distinguish plaintiffs' contrary evidence, and because the court cast the evidence on which it relied in a form to provide an answer to the single question of discriminatory intent, we are convinced that the basis on which the court fashioned dissolution of the injunction was flawed.

VII. Relief

Thus, we must focus not on whether the Plan is nondiscriminatory but whether it solves the problems created by the changed conditions in the District. We are certain it does not. While there is evidence of demographic change, that evidence does not support a return to the neighborhood schools in the elementary grades because the same neighborhoods remain predominantly white and predominantly black. Moreover, the Plan restores the effects of *past* discriminatory

intent remedied by the decree by recreating racially identifiable elementary schools, overlooking school capacity problems, and failing to address faculty imbalance. Addressing these shortcomings does not overburden *Swann*'s remedial baggage.[52]

We are mindful that *Swann* contemplates actions which are systemwide in effect,[53] and the Plan affects only the elementary schools, leaving the Finger Plan in place for the middle and high schools. Nevertheless, we are convinced that the impact of the Plan on the District as a whole is greater than the sum of each of these parts.[54] As Judge Wisdom noted, "Infection at one school infects all schools. To take the most simple example, in a two school system, all blacks at one school means all or almost all whites at the other." *United States v. Texas Educ. Agency*, 467 F.2d 848, 888 (5th Cir. 1972) (quoted in *Keyes*, 413 U.S. at 201). Indeed, "[t]he effect of a racially discriminatory practice is pervasive. That effect is not eradicated by merely erasing the original cause." *Lawrence County School Dist.*, 799 F.2d at 1044.

The focus of our concern remains on the Board's duty. "Part of the affirmative duty imposed by our cases . . . is the obligation not to take any action that would impede the process of disestablishing the dual system and its effects." *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. at 538 (1979). Despite its cosmetic trappings, the Plan is such an impediment. While the

[52] "One vehicle can carry only a limited amount of baggage." *Swann*, 402 U.S. at 22. In *Brown v. Topeka*, slip op. at 70, we suggested the Board of Education had not "exhausted the repertoire available for desegregating schools." This repertoire remains available to the Board as well.

[53] "The constitutional command to desegregate schools does not mean that every school in every community must always reflect that racial composition of the school system as a whole." *Swann*, 402 U.S. at 24.

[54] Former Board president, Mrs. Susan Hermes, conceded that there are no guarantees that student reassignments would not occur for grades 5-12 in the future because of inevitable changes in the Board's membership. (R. III, 361).

Board's concerns are not without foundation, they do not translate into the maintenance of a unitary system. "And, it is the responsibility of boards of education and the district courts to prevent the reestablishment of such school systems." *Graves v. Walton County Bd. of Educ.*, 686 F.2d 1135, 1143 (5th Cir. 1982).

We are also satisfied based on our review of the record that modification of the Finger Plan is achievable without extreme disruption or burdensome expense. No geographical barriers have created the racial imbalance in the elementary schools. *Morgan v. Nucci*, 831 F.2d at 313 (unique geographic isolation caused by Boston Harbor justified single one-race middle school).[55] Nor was the evidence of white flight sufficient to justify the Plan.[56] *See Lee v. Anniston City School Sys.*, 737 F.2d 952, 957, n.3 (11th Cir. 1984) (plans designed to mitigate white flight are permissible provided desegregation effort not frustrated); *Liddell v. Missouri*, 731 F.2d 1294, 1313-14 (8th Cir.), *cert. denied*, 469 U.S. 816 (1984) (fear of white flight is no excuse to avoid desegregation).

We do not ask that "each school be a statistical image of the [District]." *Lawrence County School Dist.*, 799 F.2d at 1047. Nor do we suggest annual assignment alterations to mirror the ever-changing demographic makeup of this urban setting. However, on the basis of the record, it is clear that other measures that are feasible remain available to the Board " 'to improve

[55] The Finger Plan already accommodated a geographically isolated area in its treatment of the Star-Spencer area.

[56] In *Riddick*, 784 F.2d at 521, the Fourth Circuit affirmed the district court's finding the reinstitution of a neighborhood school system retained the district's unitariness despite the creation of one-race schools. The court, recognizing that white flight alone cannot justify the failure to dismantle a dual school system, found the "school board legitimately considered the presence of 'white flight' in pursuit of a voluntary plan to stabilize school integration in Norfolk." *Id.* at 540. In a recent article, Professor Landsberg notes that "the early predictions of white flight in Norfolk did not materialize," citing an *American Lawyer* study that found that "white flight early in the desegregation process does not necessarily provide an accurate prediction of later behavior patterns." 48 La. L. Rev. at 830, n.192.

the fit between a decade of demographic changes . . . and the terms of student access to educational opportunities.' " *Morgan*, 831 F.2d at 318 (quoting district court order, *Morgan v. Nucci*, 620 F. Supp. 214, 220 (D. Mass. 1985)).

Our remand remains within the framework of the injunctive relief plaintiffs achieved. "Inasmuch as an injunctive decree is drafted in light of what the court believes will be the future course of events, a court must continually be willing to redraft the order at the request of *the party* who obtained equitable relief in order to insure that the decree accomplishes its intended result." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2961, at 600 (1973) (emphasis added). Remand is not predicated on the perpetual supervision of the district court but preserves the Board's duty "to achieve the greatest possible degree of actual desegregation." *Swann*, 402 U.S. at 26.[57]

> It is well to remember that the course we are running is a long one and the goal sought in the end — so often overlooked — is the best possible educational opportunity for all children. Communities deserve the freedom and the incentive to turn their attention and energies to this goal of quality education, free from protracted and debilitating battles over court-ordered student transportation.

Keyes, 413 U.S. at 253 (Powell, J. concurring in part, dissenting in part). Consistent with this goal, and with deliberate speed, the district court, on remand shall:

1. Take evidence of plaintiffs' and defendants' alternatives to maintain racially balanced elementary schools within the framework of the changed circumstances that have occurred in the District;

[57] This duty is clearly distinguishable from defendants' perception of plaintiffs' position as "nothing more than a plea to continue the busing of Oklahoma City's young students in perpetuity." We do not share that perception. By this remand we do not propose, as stated by the dissent at p.25, that amendment of desegregation decrees is only for plaintiffs. That suggestion ignores the plain import of all for which this opinion stands and is unwarranted by anything we have stated.

2. Modify the Finger Plan to accommodate the changed circumstances;

3. In modifying the Finger Plan, assure that faculties achieve racial balance under the District's Affirmative Action Plan;

4. In a manner workable to the parties and the court, retain jurisdiction for a reasonable period of time to oversee the implementation and maintenance of these assignments.

The judgment of the district court is thus VACATED[58] and the case REMANDED for further proceedings to modify the 1972 decree consistent with this opinion.

[58] Because we have vacated the judgment, the Board is no longer a prevailing party entitled to costs and attorney fees.

No. 88-1067, Robert L. Dowell and Vivian C. Dowell et al. v. The Board of Education of the Oklahoma City Public Schools, Independent District No. 89, Oklahoma City, Oklahoma, a Public Body Corporate; et al.

BALDOCK, Circuit Judge, dissenting.

It is ironic that the capstone of this court's opinion is a quote from Justice Powell,[1] concerning the importance of securing quality education free from "protracted and debilitating battles over court-ordered

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[1] Surely Justice Powell would not have embraced this court's failure to terminate jurisdiction when a system has achieved and maintained unitary status. His eloquent dissents in *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 478 (1979) (Powell, J., dissenting), and *Dayton Bd. of Educ. v. Brinkman (Dayton II)*, 443 U.S. 526, 542 (Powell, J., dissenting), began with the observation that 25 years after *Brown v. Board of Educ. (Brown I)*, 347 U.S. 483 (1954), "the federal judiciary should be limiting rather than expanding the extent to which courts are operating the public school systems of our country." *Columbus*, 443 U.S. at 480 (Powell, J., dissenting). When read against a backdrop of a unitary school system, Justice Powell's concern for federalism, parental and community support of education, student retention and effective public schools are strong arguments against coercive federal authority in the absence of purposeful racial discrimination. *See id.* at 485-89.

In dissenting from the dismissal of certiorari petitions, Justice Powell emphasized the importance of "identify[ing] the link between the constitutional violation and the desegregation remedy," and recognized that "[i]n large cities, the principal cause of segregation in the schools is residential segregation, which results largely from demographic and economic conditions over which school authorities have no control." *Estes v. Metro. Branches of the Dallas NAACP*, 444 U.S. 437, 445 (Powell, J., dissenting from dismissal of petitions for certiorari); *see also id.* at 447; *Columbus*, 443 U.S. at 480-81 (Powell, J., dissenting). Moreover, Justice Powell commented upon the misuse, by lower federal courts, of the *remedial* language in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971), that "the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation." *Estes*, 444 U.S. at 446 n. 13. This court precedes its quote by Justice Powell with that very language from *Swann*. *See* Court's Opinion at 52-53.

Justice Powell adhered to the well-supported position that the constitutional violation by the school board determines the scope of the applicable remedy. *Delaware State Bd. of Educ. v. Evans*, 446 U.S. 923, 924-27 (1980) (Rehnquist J. (joined by Powell, J. & Stewart J.), dissenting from denial of certiorari); *Cleveland Bd. of Educ. v. Reed*, 445 U.S. 935, 937-38 (1980) (Rehnquist J. (joined by Powell, J. & Burger, C.J.), dissenting from denial of certiorari). It is adherence to that principle which seems most in jeopardy following this court's opinion.

student transportation." *Keyes v. School Dist. No. 1*, 413 U.S. 189, 253 (1973) (Powell, J., concurring in part and dissenting in part); *see* Court's Opinion at 53 (quoting same). Here, despite the school district's continued unitary status, this court retains jurisdiction and now orders the school district to racially balance the elementary schools which most certainly will require busing. Court's Opinion at 53. The court also orders the school district to racially balance the elementary faculties. *Id.* The district court is to proceed "with deliberate speed." *Id. See* W. Douglas, *The Court Years* 115 (1980) (discussing delay attributable to Justice Frankfurter's "all deliberate speed" language in *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 301 (1955)).

Apparently, Justice Powell's view concerning transportation of elementary students was overlooked by this court. In fact, in the very next sentence of the passage relied upon by this court, Court's Opinion at 53, Justice Powell expressed his disapproval: "The single most disruptive element in education today is the widespread use of compulsory transportation, especially at elementary grades." *Keyes*, 413 U.S. at 253 (Powell J., concurring in part and dissenting in part). He urged a return "to a more balanced evaluation of the recognized interests of our society in achieving desegregation with other educational and societal interests a community may legitimately assert." *Id.*; *see also Columbus*, 443 U.S. at 479, 486-87 (Powell, J., dissenting). Justice Powell's views concerning elementary transportation and other educational objectives, while perhaps not persuasive concerning an officially dual school system in 1973 when *Keyes* was decided, would seem to have greater force where, as here, a school system has achieved unitary status and seeks to enhance parental involvement, retain students and improve educational opportunity through a return to neighborhood schooling, only in grades 1-4, at the elementary level. The "more balanced evalua-

tion" of educational and social objectives is precisely what is missing from this court's resolution of the case.

I.

This court's opinion is faulty for three reasons: 1) improper reliance upon principles concerning the modification and termination of injunctions which are inapposite in the school desegregation context, 2) inadequate recognition of the legal effect of the school district's unitary status, and 3) insufficient deference to the factual findings of the district court concerning segregative intent.

A.

This case arises in the unusual procedural context of the district court finding the school system unitary in 1977 and terminating jurisdiction of the case. The case was revived when the school district adopted a new student assignment plan, although a 1972 decree had not been lifted. In *Dowell v. Board of Educ.*, 795 F.2d 1516 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986), this court determined that reopening the case was appropriate so that the plaintiffs would have an opportunity to be heard on the constitutionality of the plan. *Id.* at 1519.

Although *Dowell* did not express an opinion concerning the constitutionality of the neighborhood school plan at the elementary level, it cast the dispute in terms of injunction modification and termination law, and decided that a finding of unitariness does not alter the defendants' "duty to persist in the elimination of the vestiges of segregation." 795 F.2d at 1520. Of course, a finding of unitariness is inconsistent with remaining vestiges of state-imposed segregation (a constitutional violation), but in this case, the court adheres to its erroneous decision that "a finding of unitariness [does not] mandate the later dissolution of the decree without proof of a substantial change in circumstances which led to the issuance of that decree." Court's Opinion at 19.

Although the court in *Dowell* did not intend, even implicitly, to address the ultimate issue of constitutionality of the neighborhood school plan, 795 F.2d at 1523, the court framed the issue so as to give no practical effect to the 1977 unitariness finding. The school board retained the burden of proof that its conduct was not segregative; the plaintiffs only were required to prove that the 1972 decree had been violated. *Id.* at 1523. In its opinion, the court has adopted that approach and has given no effect to the principle that "the differentiating factor between *de jure* and . . . *de facto* segregation . . . is *purpose* or *intent* to segregate." *Keyes*, 413 U.S. at 208 (emphasis in original). This case really turns on the responsibility of these defendants to ameliorate the effects of residential separation so often found in urban locations, including Oklahoma City.

It is beyond dispute that the school board cannot take actions intended to perpetuate or re-establish a dual school system. *See Dayton II*, 443 U.S. at 538 (concerning student assignment, school construction and closings); *Columbus*, 443 U.S. at 460 (concerning school construction and closings); *Swann*, 402 U.S. at 21 (same). Here, the school board deviated from the student assignment plan contained in the 1972 decree (grades 1-4) because the plan no longer was equitable and the board sought to improve the quality of elementary education. Although the school board should have proceeded to district court to have the 1972 decree dissolved, its apparent belief that the 1977 finding of unitariness dissolved the decree was certainly understandable given the state of the law at the time. In any event, we now consider whether the 1972 decree should be enforced or modified. Court's Opinion at 8.

At the hearing below, both parties sought to modify the district court's 1972 decree requiring implementation of the Finger Plan. The defendants sought to retain their neighborhood school plan at the elementary level. The plaintiffs sought to eliminate, at

least in part, the neighborhood school plan and substitute in its place a new plan, prepared by Dr. Gordon Foster, which involved pairing and clustering schools and changing the grade structure of several elementary schools. The plaintiffs contended that the proposed plan was consistent with the 1972 decree, which they maintained had become inequitable, and they contended that the proposed plan was better than the neighborhood school plan. *See* rec. vol. I, doc. 17, app. A (final pretrial order — plaintiff's contentions).

Because the school district had *attained and maintained unitary status*, plaintiffs were required to demonstrate that the district had lost its unitary status through purposefully segregative school board actions. When the entirety of Supreme Court desegregation precedent is applied in the context of a unitary school district, I do not agree with this court that the findings of the district court are clearly erroneous. Rather those findings are supported by the record and merely reflect the district court's choice among expert and lay testimony, which at times conflicted, concerning direct and circumstantial evidence of segregative intent.

Moreover, I question retention of jurisdiction in this case given the unitary status of the school district. Four other circuits hold that current desegregation law does not envision continued federal jurisdiction in the affairs of local school districts in perpetuity once a school district becomes unitary. *See United States v. Overton*, 834 F.2d 1171, 1176, 1174-77 (5th Cir. 1987) ("We see *Dowell*'s effort to declare a school district to be unitary while retaining jurisdiction as an illusion that denies the essence of unitariness.") (Higginbotham, J.); *Morgan v. Nucci*, 831 F.2d 313, 318 (1st Cir. 1987) ("Although the [Supreme] Court has produced no formula for recognizing a unitary school system, the one thing certain about unitariness is its consequences: the mandatory devolution of power to local authorities."); *Riddick v. School Bd.*, 784 F.2d 521,

535, 534-39 (4th Cir. 1986); ("[O]nce the goal of a unitary school system is achieved, the district court's role ends."); *Vaughns v. Board of Educ.*, 758 F.2d 983, 988 (4th Cir. 1985) ("A district court's jurisdiction to grant further relief in school desegregation cases in not perpetual . . . . Once a school system has achieved unitary status, a court may not order further relief to counteract resegregation that does not result from the school system's intentionally discriminatory acts."); *Spangler v. Pasadena Bd. of Educ.*, 611 F.2d 1239, 1241 (9th Cir. 1979); *Id.* at 1247 ("Retention of jurisdiction when there is no longer a demonstrated need to monitor compliance may defeat important governmental and personal interests . . . . There is no warrant for retaining further jurisdiction in the case, and the district court should enter an order relinquishing all further jurisdiction.") (Kennedy, J., concurring)[2]; *but see United States v. Board of Educ.*, 794 F.2d 1541, 1543 (11th Cir. 1986) (per curiam) (when parties have relied on desegregation orders to make commitment to start desegregation process, it *may* be inappropriate to vacate such orders even after unitary status attained). *Contra Dowell*, 795 F.2d at 1516 (10th Cir.). This court's "semantic recasting of unitary status," *Overton*, 834 F.2d at 1176, in terms of prohibitory injunction law aimed at private parties and relief from judgment, Fed. R. Civ. P. 60(b), displaces the concept of unitary status and insures federal involvement, even in the absence of a constitutional violation.

To impose onerous duties on the school board, this court improperly relies upon desegregation passages involving dual systems charged with the affirmative duty to eradicate *de jure* segregation and its vestiges. *See, e.g.*, Court's Opinion at 37 (relying upon *Swann*'s quotation of *Green v. County School Bd*, 391 U.S. 430, 439 (1968), 402 U.S. at 13, for affirmative duty); Court's

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[2] The main opinion and the concurring opinion in *Spangler* are both opinions of the court; the third member of the panel joined in both. 611 F.2d at 1242.

Opinion at 48 (relying upon *Swann*, 402 U.S. at 28, for discussion of neutral assignment plans which may not be compatible with affirmative duty); Court's Opinion at 48 (relying upon *Davis v. Board of School Comm'rs*, 402 U.S. 33, 37 (1971), for concept that desegregation plan must be effective, given *remedial* responsibility of local board); Court's Opinion at 22-23, 51 (relying upon *Dayton II*, 443 U.S. at 538, concerning board's affirmative duty not to perpetuate or reestablish dual school system and the heavy burden the board faces in explaining actions not consistent with the affirmative duty). We have a very different situation in this case — this board has met its affirmative duty and no longer is under "an unsatisfied duty to liquidate a dual system." *See Dayton II*, 443 U.S. at 538.

Under any test in which segregative intent is relevant, I cannot agree that the neighborhood school plan for the elementary grades 1-4 had "the effect of making the District '*un*-unitary' by reviving the effects of past discrimination." Court's Opinion at 37 (emphasis in original); *see also id.* at 50 ("the Plan restores the effects of *past* discriminatory intent remedied by the decree") (emphasis in original).[3] Of course, the word "un-unitary" seems unnecessary in the lexicon of school desegregation law; an "un-unitary" system is a dual system, and the inquiry here is whether the neighborhood school plan signals the return of a dual

[3] The blueprint for the court's approach to the substantive desegregation law, but not the injunction law, in this case is contained largely in B. Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 La. L. Rev. 789 (1988) [hereinafter cited as *Landsberg*] (cited in Court's Opinion at 20-21, 21 n.18 & 51 n.56). *Compare* Court's Opinion at 37 (concerning the effects of past discriminatory intent) *with Landsberg* at 817, 826, 837-38 (same); *compare* Court's Opinion at 50, 50 n.52 (concerning *Swann's* remedial baggage) *with Landsberg* at 819 (same); *compare* Court's Opinion at 48 (*Swann's* "loaded game board" and unitariness) *with Landsberg* at 826 (same); *compare* Court's Opinion at 51-52 & 51 n.56 (concerning extra-record evidence about Norfolk plan and white flight) *with Landsberg* at 830 & 830 n.51 (same); *compare* Court's Opinion at 16 (concerning compliance alone with injunctions) *with Landsberg* at 811 n.121 (same). Mr. Landsberg endorses the Tenth Circuit approach in *Dowell*, 795 F.2d at 1516. *Landsberg* at 815 n.135, 834-35.

system. This court overturns the district court's decision to dissolve the injunction implementing the 1972 desegregation plan for two reasons: 1) because the district court "failed to address or distinguish plaintiffs' contrary evidence," and 2) because the district court "cast the evidence on which it relied in a form to provide an answer to the single question of discriminatory intent . . . ." *Id.* at 49. Both reasons given by this court are wanting.

B.

Under Fed. R. Civ. P. 52(a) and *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985), we are not at liberty to reverse the district court's factual findings unless they are clearly erroneous. Where, as here, "there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* Admittedly, the failure to address truly contrary evidence may leave the door open for the court of appeals to find internal inconsistencies or implausibility in the evidence relied upon, *see id.* at 575, but the ultimate inquiry is whether the "district court's account of the evidence is plausible in light of the record viewed in its entirety." *Id.* at 574. Considering what issues are material in this lawsuit, I would affirm the district court. There is ample evidence to support the finding that, even with the introduction of a neighborhood school plan in grades 1-4, the school board still operates a unitary system.

One of the most serious technical problems with this court's decision is the methodology of identifying racially disproportionate schools after implementation of the neighborhood plan. This court claims that 32 out of 64, or one-half, of the elementary schools are now "one-race majority schools." Court's Opinion at 22, 32, 44. We are told that only "[t]hirty-two elementary schools remained racially mixed." *Id.* at 7. This analysis is flawed. The district court properly was concerned with the emergence of 90%+ black schools as a

result of the neighborhood plan. *Dowell v. Bd. of Educ.*, 677 F. Supp. 1503, 1509-1510 (W.D. Okla. 1987). Here, this court correctly notes that 11 out of 64 elementary schools are 90%+ black after the plan. Court's Opinion at 6-7. But then the court adds to the number of racially disproportionate schools by deciding that if a school has less than 10.7% black enrollment, it is not racially mixed, regardless of the presence of other minorities. *See id.* at 7, 7 n.2. A significant portion of the data in this case only distinguished between black students and other students.[4]

[4]

Membership by School Race
K-4 Elementary Schools
Includes K-4 Portion of K-5 Elementary Schools
1986-87

School	Black	Other	Total	% Black
Adams	23	354	377	6.1
Arthur	23	291	314	7.3
Bodine	199	382	581	34.2
Britton	118	193	311	37.9
Columbus	63	349	412	15.2
Coolidge	23	420	443	5.1
Creston Hills	219	2	221	99.0
Davis	16	145	161	9.9
Dewey	248	4	252	98.4
Edgemere	154	146	300	51.3
Edwards	218	1	219	99.5
Eugene Field	150	321	471	31.8
Fillmore	17	246	263	6.4
Garden Oaks	181	3	184	98.3
Gatewood	68	196	264	25.7
Harrison	83	85	168	49.4
Hawthorne	64	269	333	19.2
Hayes	37	292	329	11.2
Heronville	31	314	345	8.9
Hillcrest	32	243	275	11.6
Horace Mann	67	123	190	35.2
Kaiser	38	171	209	18.1
King	278	3	281	98.9
Lafayette	6	212	218	2.7
Lee	22	309	331	6.6

While such data clearly indicates concentration of black students,[5] such an approach fails to recognize the presence of other minorities which increased since 1972; in 1985-86, non-black minorities comprised

School	Black	Other	Total	% Black
Lincoln	287	2	289	99.3
Linwood	32	202	234	13.6
Longfellow	230	2	232	99.1
Madison	30	170	200	15.0
Mark Twain	12	111	123	9.7
North Highland	315	8	323	97.5
Oakridge	125	170	295	42.3
Parker	347	11	358	96.9
Parmelee	41	305	346	11.8
Pierce	36	184	220	16.3
Polk	262	3	265	98.8
Prairie Queen	24	362	386	6.2
Putnam Heights	105	196	301	34.8
Quail Creek	31	204	235	13.1
Ridgeview	51	247	298	17.1
Rockwood	176	248	424	41.5
Sequoyah	58	238	296	19.5
Shidler	95	161	256	37.1
Shields Heights	16	385	401	3.9
Southern Hills	16	210	226	7.0
Spencer	264	82	346	76.3
Stand Watie	91	260	351	25.9
Star	212	133	345	61.4
Stonegate	170	343	513	33.1
Truman	369	1	370	99.7
Van Buren	15	178	193	7.7
West Nichols Hills	63	251	314	20.0
Western Village	208	109	317	65.6
Westwood	40	160	200	20.0
Wheeler	25	280	305	8.1
Willard	13	129	142	9.1
Willow Brook	200	188	388	51.5
Wilson	50	139	189	26.4
Subtotal	6,387	10,746	17,133	37.3
Arcadia	22	55	77	28.5
Buchanan	20	205	225	8.8
Johnson	51	137	188	27.1

13.3% of the elementary system enrollment (Hispanic, 6,8%; Native American, 4.2%; Asian-American, 2.3%). *See Dowell*, 677 F. Supp. at 1510; def. ex. 63, *reproduced in* Appellees' Addendum to Brief.

School	Black	Other	Total	% Black
Monroe	42	223	265	15.8
Rancho Village	18	151	169	10.6
Telstar	199	134	333	59.7
Total	6,739	11,651	18,390	36.6

Pl. ex. 27, *reproduced in* Appellants' Addendum to Brief at 187-91.

[5]

90%+ Black Elementary Schools

School	Black	Other	Total	% Black
Creston Hills	219	2	221	99.0
Dewey	248	4	252	98.4
Edwards	218	1	219	99.5
Garden Oaks	181	3	184	98.3
King	278	3	281	98.9
Lincoln	287	2	289	99.3
Longfellow	230	2	232	99.1
North Highland	315	8	323	97.5
Parker	347	11	358	96.9
Polk	262	3	265	98.8
Truman	369	1	370	99.7
Total	2,954	40	2,994	98.7

Pl. ex. 27, *reproduced in* Appellants' Addendum to Brief at 187-91. According to these figures, 43.8% (2954/6739) of the black elementary school population (1-4) attends a 90%+ black school.

This court took a slightly different approach to determining minority concentration in the elementary schools and concluded that 46.2% of the black K-4 elementary students attend a 90%+ black school. Court's Opinion at 32. The court's slightly higher 46.2% concentration figure is different than mine (43.8%) for two reasons. First, the court used the 1985-86 student enrollment data, pl. ex. 26, *reproduced in* Appellants' Addendum to Brief at 180-81; I used the 1986-87 data contained in pl. ex. 27, *reproduced in* Appellants' Addendum to Brief at 187-91, and the above table contains the 1986-87 data. Second, the court did not include the K-4 portion of the K-5 schools, I did. Had I followed the court's method with the 1986-87 data and not included the K-4 students which attend K-5 schools, the concentration figure would be 46.3% (2954/6387), meaning that 46.3% of the black K-4 elementary students attended a 90%+ black K-5 school.

This is a school district in which the elementary students are 50.7% white, 36.0% black and 13.3% other minority (total minority percentage of 49.3). *Id.* at 1510 (1985-86). If we compare the white enrollment with the aggregated number of minority students as is appropriate under *Keyes*, 413 U.S. at 197-98; *see also Riddick*, 784 F.2d at 527 n.7 (minority percentage aggregated, not expressed solely in terms of black enrollment), and as was done by the district court, 677 F. Supp. at 1509-10, the 21 extra schools identified by this court range from 13.8% (Lafayette) to 58.5% (Willard) minority enrollment – these extra 21 schools are not one-race schools, even if they do not contain the system-wide average (40%) of black students.[6] In-

Dr. Foster estimated that 2,445 black 1-4 students attended virtually one-race black schools; these black students comprised 46% of the total black students in grades 1-4. Rec. vol. VIII at 1298.

[6] The following 21 schools are not racially mixed according to this court. *See* Court's Opinion at 7, 7 n.2.

K-4 Elementary Schools
Membership by School
1985-86

School	% White	% Black	% Minority*
Lafayette	86.2	2.0	13.8
Shields Heights	66.9	4.0	33.1
Hillcrest	84.5	5.1	15.5
Arthur	79.8	5.7	20.2
Rancho Village	83.8	5.8	16.2
Prairie Queen	84.7	6.2	15.3
Parmelee	79.0	6.3	21.0
Davis	65.1	6.6	34.9
Willard	41.5	6.6	58.5
Coolidge	81.1	7.3	18.9
Buchanan	80.0	7.5	20.0
Lee	55.5	7.7	44.5
Southern Hills	79.0	8.0	21.0
Van Buren	75.7	8.4	24.3
Adams	80.0	8.5	20.0
Fillmore	80.8	8.7	19.2
Linwood	85.1	9.2	14.9

deed, some of these schools approach the elementary system-wide minority percentage, e.g. Lee, 44.5% minority; Willard, 58.5%. Insofar as the permissible inference of segregative intent is concerned, the 21 schools identified by this court simply do not have the same implications as the eleven 90%+ black schools.[7] This is true notwithstanding Dr. Finger's reluctance to agree that schools which have more than 10% minority enrollment, but less than 10% black enrollment, are not segregated white schools. *See* Court's Opinion at 29-30.

Indeed, one of the limitations of the 1972 Finger Plan is that it sought racial balance only with respect

School	% White	% Black	% Minority*
Wheeler	61.7	10.0	38.3
Madison	78.0	10.5	22.0
Hayes	81.0	10.7	19.0
Mark Twain	67.9	10.7	32.1

*Includes Black, Hispanic, Native American and Asian-American.

Def. ex. 63, *reproduced in* Appellees' Addendum to Brief. None of these schools are virtually one-race white schools. Though these schools contain less than the system-wide average of black students, 38.5%, pl. ex. 26, *reproduced in* Appellants' Addendum to Brief at 184, and less than the system-wide average of K-4 black elementary students, 36.04%, *id.* at 181, there is no requirement "that every school in every community must always reflect the racial composition of the school system as a whole." *Swann*, 402 U.S. at 24.

[7] The school board planned to close 2 of the 90%+ black elementary schools (Lincoln & Truman) and reopen 1 (Dunbar) at the end of the 1986-87 school year. Def. ex. 65. The 1987-88 membership projections for the remaining elementary schools reveal ten 90%+ black elementary schools. *Id.* These schools are as follows:

School	% Black
Creston Hills	99.0
Dewey	98.4
Dunbar	98.9
Edwards	99.5
Garden Oaks	98.3
King	98.9
Longfellow	99.2
North Highland	97.5
Parker	96.9
Polk	98.8

to black students. Rec. vol. III at 321. Dr. Biscoe, school administrator, was aware of this feature and testified that notwithstanding, it is important to look at total minority percentages, not just black, when evaluating the district. She said:

> Since I work a lot with federal programs and attend a lot of those meetings, as I've gone around the country one thing I've noticed that happens in many of the school districts is that people look at the percent of minority students in their district, including Orientals, Native American students, Hispanic students.
>
> Of course[,] if you look at our district in terms of total minority population as compared to white population, you get a totally different picture than if you just look at those data black-white.

Id. The district court correctly decided to aggregate minority percentages when reviewing the effects of the neighborhood plan.

Although the district court is criticized for its finding concerning intent, Court's Opinion at 49, it is apparent that this court is merely reweighing the evidence and crediting the circumstantial evidence of segregative intent — namely the emergence of one-race schools. *See id.* at 45-49. Of course, reweighing the evidence is not consistent with our appellate function. *See* 5A J. Moore & J. Lucas, *Moore's Federal Practice*, ¶ 52.03[1] (1989). This court is under the mistaken impression that circumstantial evidence of segregative intent *must* be preferred in these types of cases. *See* Court's Opinion at 47 (quoting *Keyes v. School Dist. No. 1*, 670 F. Supp. 1513, 1516 (D. Colo. 1987), *appeal pending*, Nos. 85-2814 & 87-2634 (10th Cir. submitted

Jan. 17, 1989).[8] Despite the court's contrary conclusion, the district court properly weighed all of the evidence and came to a permissible conclusion that there was an absence of segregative intent necessary to support a constitutional violation.

C.

Another obvious problem with the court's resolution of this case is its reliance upon general principles concerning the modification of injunctions when principles specifically concerning the process of desegregation have been enunciated by the Supreme Court. This court relies upon the standard of *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932), an antitrust case, for the proposition that, despite unitariness, the school board must show that the condition the injunction was designed to protect against has abated and the failure to modify the injunction will result in extreme hardship to the school board. Court's Opinion at 14-18. It is not enough that the constitutional violation has been remedied. *Id.* at 16-17 ("The condition that eventuates as a function of the injunction cannot alone become the basis for altering the decree absent the *Swift* showing."). This court severs the integral link between the desegregation decree and an extant constitutional violation contending that " 'an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate.' " *Id.* at 16 (quoting T. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 Tex. L. Rev. 1101, 1105 (1986)). How ridiculous that an injunction, meant to effectuate the law, "becomes an edict quite independent of the law it is meant to effectuate." *See id.*

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[8] This court repeatedly cites the district court decisions in *Keyes*, 609 F. Supp. 1491 (D. Colo. 1985), and 670 F. Supp. 1513 (D. Colo. 1987). *See* Court's Opinion at 22, 25 n.23, 31-32, 47. Those two decisions are now *on appeal* to another panel of this court.

II.

Given the court's position on insuring prospective relief even in the absence of a constitutional violation, unitariness is not a bar to reconsideration of the decree. Court's Opinion at 17. The court tempers its reliance on the exacting standard required for modification of injunctions by citing the dissenting portion (without so indicating) of Judge Higginbotham's opinion in *United States v. Lawrence County School Dist.*, 799 F.2d 1031, 1056 (5th Cir. 1986) ("By its forward cast, an injunction contemplates change and thus must be sufficiently malleable to adapt the ordered relief to contemporary circumstances.") (Higginbotham J., concurring in part and dissenting in part). *See* Court's Opinion at 17; *see also Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424, 437 (1976) (recognizing propriety of modification when there is continuing supervision). Moreover, Judge Higginbotham, writing for a unanimous panel, quite firmly has rejected this court's approach in *Dowell. Overton*, 834 F.2d at 1174-77.

Swift simply does not apply to the vast majority of desegregation decrees. In *Spangler v. Pasadena Bd. of Educ.*, Justice (then judge) Kennedy explained the inapplicability of *Swift* to a district court's termination of equitable jurisdiction in school desegregation cases. *Spangler*, 611 F.2d at 1245 n.5.

> *Swift* involved the efforts of antitrust defendants who had entered into a consent decree prohibiting anticompetitive actions to modify the decree by lifting some of its prohibitions. It is doubtful the case supports the district court's retention of jurisdiction. *Swift* establishes general criteria for dissolution or modification of prohibitory injunctions against private wrongdoers. More recent Supreme Court desegregation decisions have established specific criteria for dissolution of regulatory injunctions imposed upon public

> school authorities . . . [T]hese criteria recognize (1) that the proper function of a school desegregation decree is remedial, and (2) necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination. *See Milliken v. Bradley [Milliken II]*, . . . 433 U.S. [267,] at 280-82, 97 S. Ct. 2749 [(1977)].

Id. Justice Kennedy's reasoning is equally applicable to this court's retention in perpetuity of equitable jurisdiction over a unitary system, using the desegregation decree as the vehicle.

Virtually all of the cases relied upon by this court in its application of *Swift* involve unsuccessful attempts to obtain, modify or dissolve injunctions which forbid or limit private commercial conduct; in the main, they concern prohibitory private injunctions. *See* Court's Opinion at 14-18; *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 679-80 (10th Cir. 1988) (declining to vacate injunction prohibiting securities firm from engaging in deceptive practices), *cert. denied*, 109 S. Ct. 1172 (1989); *EEOC v. Safeway Stores, Inc.*, 611 F.2d 795, 797-98, 799 n.7 (10th Cir. 1979) (Title VII consent decree not modified), *cert. denied*, 446 U.S. 952 (1980); *SEC v. Thermodynamics, Inc.*, 464 F.2d 457, 458 (10th Cir. 1972) (declining to modify injunction prohibiting individual from violating registration and antifraud provisions of 1933 Act), *cert. denied*, 410 U.S. 927 (1973); *SEC v. Jan-Dal Oil & Gas, Inc.*, 433 F.2d 304, 305 (10th Cir. 1970) (reinstating injunction prohibiting company and individual from selling mineral interests or any other security in violation of 1933 Act); *Humble Oil & Refining Co. v. American Oil Co.*, 405 F.2d 803, 807 n.1 (8th Cir.) (declining to modify injunction prohibiting energy company from using trademark or trade name), *cert. denied*, 395 U.S. 905 (1969); *but see United States v. W.T. Grant Co.*, 345 U.S. 629, 630 (1953) (affirming denial of injunction).

The one case concerning a public injunction relied upon by this court is *Battle v. Anderson*, 708 F.2d 1523 (10th Cir. 1983) (McKay, J. & Doyle J.), *cert. dismissed*, 465 U.S. 101 (1984). The case involved the district court's jurisdiction to require prison authorities to submit: 1) a policy statement, and 2) a plan to avoid a return to unconstitutional prison conditions, and indicate when compliance with an earlier stipulation concerning prison conditions could be expected. *Id.* at 1540. This court understood that the district court order was "limited in scope and . . . targeted to assure compliance with past decrees and to prevent a recurrence of unconstitutional conditions." *Id.* at 1540. The school desegregation cases were cited as authority for the court's decision. *Id.* at 1538, 1538 n.3.

Under the *Swift* standard it is "virtually impossible" to vacate or modify an injunction when the beneficiary of the injunction does not consent. *SEC v. Blinder, Robinson & Co.*, 855 F.2d at 679. Thus, from a practical perspective, the *Swift* line of cases are ill-suited for deciding when a desegregation decree should be terminated or modified on motion of a school board. Desegregation decrees are primarily mandatory injunctions, rather than prohibitory injunctions, and involve complex affirmative commands often concerning student and faculty/staff assignment. *See* D. Dobbs, *Handbook on the Law of Remedies*, § 2.10 at 105 (1973). As the volume of litigation indicates, the framing and enforcement of a desegregation decree is more complex than merely prohibiting an act.

Another reason why the *Swift* line of cases is inappropriate is that desegregation decrees are not designed to operate over several decades. *See* Court's Opinion at 16 n.12 (noting *Swift* decrees were in effect

for 76 years). As Dr. Finger testified in this trial, he would have expected that his 1972 plan "would have been quite extensively modified." Rec. vol. VIII at 1198. For example, he did not expect that the fifth-year centers would be retained, but rather would have been incorporated into the middle schools. Rec. vol. VIII at 1198-99. Nor did he expect that there would be resistance to "stand-alone" schools, for one of the traditional objectives of desegregation planning is "to make as many naturally desegregated schools as you can make." *Id.* at 1200.

Dr. Finger's testimony underscores why compliance to the letter with a desegregation decree over an unlimited time span would be inappropriate. In explaining his reaction to the unexpected retention of the fifth-year centers contained in his 1972 plan, he said:

> [A] lot of things happened . . . that people didn't anticipate, . . . that our cities would become more minority, that birth rates would change, that the . . . number of white children in cities would change. A lot of things have happened since 1972. The world today is not the same as it was in 1972, . . . and very drastic changes have taken place, and I . . . know its been difficult for the school board and the school department to contend with all these differences that occurred, . . . and I can see that these decisions are really tough.

Id. at 1199. A school district does not have the luxury of ignoring change; it is part of a dynamic system continually confronted by demographic and social forces not of its own making. *See Swann*, 402 U.S. at 31-32. The *Swift* standard has been applied in the context of terminating antitrust injunctions, or other commercial injunctions between private parties. Applying the *Swift* standard to the modification or termination of school desegregation orders is unwarranted and impractical.

From the beginning, the Supreme Court recognized the need for "practical flexibility" in "effectuat[ing] a transition to a racially nondiscriminatory school system." *Brown II*, 349 U.S. at 300-01. The Court also recognized the need for continued oversight and adjustment during this period. *Id*; *Green*, 391 U.S. at 439 (continued evaluation by district court needed). In the remedial phase, the Court has insisted upon flexibility, *see, e.g., Swann* 402 U.S. at 28, which is inconsistent with the fixed nature of the relief generally founded in cases following *Swift*. Indeed, at the conclusion of its opinion, this court recognizes the need for continual redrafting of desegregation decrees, but only for the plaintiffs in school desegregation litigation, not for the defendants. Court's Opinion at 52; *see also id.* at 15 n.11 (relying upon *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248-49 (1968)).[9] Despite this court's protestations to the contrary in its revised opinion, Court's Opinion at 53 n.57, the standard it adopts for modification of desegregation decrees at the request of defendants is far more difficult than the standard for plaintiffs.

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[9] This court's reliance on *United Shoe*, another antitrust case, is further evidence of the paucity of direct authority supporting its position. *United Shoe* involved one firm's monopolization of the shoe machinery industry; the injunction dissolved the firm into three separate companies. *Id.* at 246. Were we embarking upon some new and uncharted field of law, reliance upon antitrust cases might be justified. However, and with all due respect, I believe that the plethora of desegregation cases decided during the last three decades affords the court a more fruitful source of precedent than tangentially-related antitrust cases; the logical nexus between school children and shoe machinery is a strained one indeed.

This court's reliance upon *Swann*, 402 U.S. 1 at 15-16, to support application of commercial prohibitory injunction cases in the school desegregation context is misplaced. Court's Opinion at 13 n.8. The Supreme Court did say that "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial *of a constitutional right.*" *Swann* at 15-16 (emphasis supplied). However, the commercial injunction cases relied upon by this court hardly involve the denial of constitutional rights. Moreover, the Court in *Swann* emphasized that "judicial powers may be exercised only on the basis of a constitutional violation," and that "[j]udicial authority enters only when local authority defaults." *Id.* at 16.

III.

In deciding whether a desegregation decree should take on a life of its own after unitary status has been achieved, it is well to keep in mind the purpose of and criteria for the design of equitable relief in the remedial phase of school desegregation cases. The purpose of the relief is to eliminate an unconstitutional dual school system and its vestiges arising from state-imposed segregation. *Swann*, 402 U.S. at 15, 28. In devising a remedy, three factors predominate: 1) the nature and scope of the constitutional violation determines the remedy, *Swann*, 402 U.S. at 16; *see also Pasadena*, 427 U.S. at 434; *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 738 (1974), 2) the decree must be remedial, designed to restore the victims of discriminatory conduct to the position that they would have been in had the discriminatory conduct not occurred, *id.* at 746, and 3) the district court must consider the value of state and local control of public education, *Dayton I*, 433 U.S. at 410. *Milliken II*, 433 U.S. at 280-81. Of course, local school district boundaries and policies must be set aside if they conflict with the dictates of the fourteenth amendment. *Milliken I*, 418 U.S. at 744. But in this case, all of the above factors have not been applied; instead a new long-term remedy has been imposed under the guise of an extension of the old, without due regard for the restitutionary purpose of a desegregation remedy and the importance of local control. This comes as no surprise because the court "approach[es] this case not so much as one dealing with desegregation, but as one dealing with the proper application of the federal law on injunctive remedies." Court's Opinion at 4, *but see id.* at 21-22 n.19 ("[O]ur focus is upon the issue of desegregation.").

The Supreme Court's desegregation cases suggest that a district court's jurisdiction is finite and that the decree does not survive the termination of jurisdiction. The Court envisioned a "period of transition" "to a racially nondiscriminatory school system." *Brown II*, 349 U.S. at 301. A "transition" is defined as "a passage or movement from one state, condition, or place to another." *Webster's Third New Int'l Dictionary* at 2428 (1981). In *Green*, the Supreme Court spoke of "convert[ing] to a unitary system" and "retain[ing] jurisdiction until it is clear that state-imposed segregation has been completely removed." 391 U.S. at 438-39. The goal was "to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." *Id.* at 442. In *Raney v. Board of Educ.* 391 U.S. 443 (1968), decided the same day as *Green*, the Court held that rather than dismissing a desegregation complaint, a district court should "retain jurisdiction until it is clear that disestablishment had been achieved." *Id.* at 449.

In *Swann*, Chief Justice Burger, writing for a unanimous Court, indicated that the role of the federal court would end at some time. 402 U.S. at 31-32. The Court further recognized that the school desegregation cases are not the appropriate vehicle for alleviating the effects of other private or public action which might result in segregation.

> We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious or ethnic grounds . . . . The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination.

Swann, 402 U.S. at 22-23. Although that the Court did not address other state action which might contribute to disproportionate racial concentrations in some schools, *id.* at 23, the Court discussed limitations on federal equitable power and said:

> At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. The systems would then be "unitary" in the sense required by our decisions in *Green* and *Alexander*.
>
> It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

Id. at 31-32.[10] This suggests that a desegregation decree does not have an unlimited life, once the constitutional violation is remedied. This view is consistent with the Court's earlier comment that "[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial

[10] This court tells us that "*Swann* envisioned stability 'once the affirmative duty to desegregate has been accomplished and racial discrimination through official action has been eliminated from the system.' 402 U.S. at 32." Court's Opinion at 37 n.39. The above passage indicates just the opposite: demographic stability was *not* envisioned.

basis." *Id.* at 28. Nevertheless, this court's command for racial balancing is judicially ordered assignment in the absence of a constitutional violation. It is notable that the Court did not hold that the district court could deal with future problems after unitary status by relying upon a violation of the last injunctive decree; rather, the district court can fashion a remedy based upon current conditions, or upon showing of purposeful resegregation, a constitutional violation.

In *Pasadena*, the Supreme Court held that once a desegregation plan concerning student assignment had achieved its objectives, and no showing is made of intentionally segregative actions by the school board, the district court's role in student assignment comes to an end. 427 U.S. at 435-437. This court distinguished *Pasadena* in *Dowell* as a case in which "an aggrieved party sought remedial relief in addition to the previous decree." 795 F.2d at 1522. But in *Pasadena*, the school board, "requested the District Court to dissolve its injunctive order requiring that there be no school in the [district] with a majority of any minority students enrolled." *Pasadena*, 427 U.S. at 431; *see also id.* at 428-29 (setting out relief requested by school board); *Spangler v. Pasadena Bd. of Educ.*, 375 F. Supp. 1304, 1305 (C.D. Cal. 1974) (relief sought by school board), *aff'd*, 519 F.2d 430 (9th Cir. 1975), *vacated and remanded*, 427 U.S. 424 (1976). Thus, contrary to this court's assumption, *Pasadena* was not a case "in which an aggrieved party sought remedial relief in addition to the previous decree" or "an attempt to achieve further desegregation based upon minor demographic changes not 'chargeable' to the board." *See Dowell*, 795 F.2d at 1522. The court's characterization is understandable only if compliance with the plan is viewed as an attempt to achieve further desegregation.

The court in *Dowell* also suggested that *Pasadena* was explainable in terms of "minor shifts in demographics or minor changes in other circumstances which are not the result of an intentional and racially

motivated scheme to avoid the consequences of a mandatory injunction. . . ." 795 F.2d at 1522. The court then contrasted this case with *Pasadena* because this case involves abandoning the 1972 desegregation plan in favor of a plan "which *appears* to have the same segregative effect as the attendance plan which generated the original lawsuit." *Id.* (emphasis in original).

The rationale of *Pasadena* and *Swann* consistently address the limits of federal equitable power when unitariness has been attained and constitutional violation abated. The result of *Pasadena* turns, not upon the size of the racial imbalance or demographic shift, but rather, upon whether the school district engineered an unconstitutional separation after achieving unitariness with respect to student assignment. 427 U.S. at 434.

A dispassioned reading of *Pasadena* also seriously undercuts this court's view that the 90%+ black schools in this case are ipso facto an effect of past discriminatory intent. *See* Court's Opinion at 50. In *Pasadena*, 5 out of 32 schools had majority black student enrollments just four years after the 1970 decree implementing the desegregation plan. 427 U.S. at 431. Yet, because the school board was not responsible for creating this situation, readjustment was not necessary. Attendance areas could be left as they were. Finally, *Pasadena* made it clear that a school system can be unitary with respect to student assignment, even if it is not with respect to faculty/staff assignment. *Id.* at 436.

IV.

Resuscitating the 1972 decree in this case has the effect of vitiating any benefits of unitary status for the school district. As noted by the Fifth Circuit:

> The difficulty with *Dowell*'s approach is that it denies meaning to unitariness by failing ever to end the judicial superintendence of schools. Of course, school districts cannot escape the duty to maintain their school systems in conformity with the Constitution. Attaining unitary status, however, means that a school board is free to act without federal supervision so long as the board does not purposefully discriminate; only intentional discrimination violates the Constitution. As we have said, a school district is released from the consequences of its past misdeeds when it eliminates the vestiges of a segregated system and achieves a true unitary system.

Overton, 834 F.2d at 1175 (footnote omitted). Redemption is not the hallmark of this court's approach, but there are several other reasons why the approach of *Dowell* as realized in this case, is not in keeping with the mechanics of school desegregation litigation.

Most critical is the burden of proof. Without question, this court today has placed upon the unitary school district the same burden it would have, had it operated a statutorily or officially dual school system yesterday. This court's first error is in assuming that certain concepts associated with becoming unitary such as "affirmative duty" and "maximum practicable desegregation," Court's Opinion at 21-22, have equal relevance once the district has attained and maintained unitary status. This court reasons that once the plaintiffs have shown that the injunction has not been complied with, here because of the emergence of the inflated 32 out of 64 "one-race majority" schools, *see supra* p. 10-19, the defendants have the burden of showing "changed circumstances or oppressive hardship." Court's Opinion at 22.

What this means is that the school board is put back at the "proverbial first square." *See id.* at 16. Indeed, in its discussion of the burden of proof, this court resurrects two presumptions: one applies when a prima facie case of intentional segregation by school authorities has been proven; the other applies once a

system-wide violation has been established and a remedy is being implemented. Court's Opinion at 21-23; *see also Dowell v. Board of Educ.*, 465 F.2d 1012, 1014 (10th Cir.) (presumptions applied to Oklahoma system), *cert. denied*, 409 U.S. 1041 (1972). This court relies upon *Dayton II*, 443 U.S. at 538, as quoted in *Clark v. Board of Educ.*, 705 F.2d 265, 271 (8th Cir. 1983)[11] for the presumption that actions which increase or continue the effects of a dual system are inconsistent with a school board's affirmative duty to liquidate that system, and that the board faces a heavy burden in providing an explanation for such actions. *See* Court's Opinion at 23. The court also discusses the *Swann* presumption against one-race schools, 402 U.S. at 26, in the remedial phase of desegregation litigation.

To understand the problems with this court's approach, it is necessary to understand how the burden of proof is allocated before a school district becomes unitary. In a system that was statutorily or officially dual, plaintiffs may establish the prima facie case by proving that there is a current condition of intentional segregation; that the *de jure* system or its vestiges remain or were reestablished in part of the school system. *Columbus*, 443 U.S. at 463-68. Even an isolated condition of current intentional segregation would violate the affirmative duty to eliminate the dual system and its vestiges and to convert to a unitary system in which racial discrimination is eradicated. *Dayton II*, 443 U.S. at 537; *Columbus*, 443 U.S. at 459; *see also* L. Tribe, *American Constitutional Law* 1498-1500 (2d ed. 1988) (discussing Supreme Court school desegregation cases).

That critical finding shifts the burden of proof to the defendants because it provides "a sufficient basis for an inferential finding of systemwide discrimina-

[11] In *Clark*, a modification of a desegregation plan was approved which resulted in 4 out of 27 elementary schools having all black enrollments. 705 F.2d at 272-74.

tory intent," which in turn will be applied to explain "racial separation in other parts of the school system." *Columbus*, 443 U.S. at 467-468. At that point, the school defendants must come forward with "proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions." *Keyes*, 413 U.S. at 210. If intent cannot be disproved, the defendants must show that their "past segregative acts did not create or contribute to the current segregated condition," in other parts of the system. *Id.* at 211. Before a determination of unitariness, the "board has a 'heavy burden' of showing that actions that increased or continued the effects of the dual system serve important and legitimate ends." *Dayton II*, 443 U.S. at 538.

To summarize, "once a court has found an unlawful dual school system, the plaintiffs are entitled to the presumption that current disparities are causally related to prior segregation, and the burden of proving otherwise rests upon the defendants." *School Bd. v. Baliles*, 829 F.2d 1308, 1311 (4th Cir. 1987). Where, as here, the system has achieved unitariness, the presumption ends. *Id.*; *see also Riddick*, 784 F.2d at 543.

But in this case, the court not only has failed to terminate the presumptions which resulted in the 1972 decree, but also has added new burdens for the school board. Now, the school board must bear the same burden it was under when discharging its affirmative duty to liquidate a dual school system, *and* it must also demonstrate that deviating from the 1972 decree would result in such extreme and unexpected hardship as to render the decree oppressive. *See* Court's Opinion at 23. According to the court, the school board was required to meet its evidentiary burden "by clear and convincing evidence." Court's Opinion at 17. It is easy to understand why concerns with educational effectiveness, parental involvement, student retention and the inconvenience of forced transportation pale in comparison to such a draconian standard.

Thus, I cannot agree with the court that the school district's "burden is not alleviated after a finding of unitariness when the decree remains in place." *Id.* at 23. As noted by the Fifth Circuit, it matters little whether we call it "maintenance of a decree or dispensing with proof of purpose or shifting the burden of proof" because the effect is the same: federal judicial power displacing local control long after schools which were once part of a dual system are "just schools" in a unitary system. *Overton*, 834 F.2d at 1176. Rejecting the argument that a unitary school district must continue with a burden to prove continually that its decisions are free of segregative purpose, the Fifth Circuit commented upon the relationship between unitary status and the school district's burden of proof.

> The elements of a violation and who must bear the burden of proof are not conceptually distinct from unitary status but are its components; indeed, the contrary assertion is dissembling. In the real world of trial and uncertain proofs, a perpetual placement upon a school board of the burden of persuading its innocence of conduct with segregative impact differs little in effect from the superintendence that attends an extant decree and pending suit.

Id. at 1176. The acknowledgment of the school district's unitary status, *Dowell*, 795 F.2d 1522; Court's Opinion at 6, 37-38, while requiring the school board to retain the burden of proof (and presumptions against it) in addition to the additional burden of meeting the *Swift* criteria for modifying a decree, proves too much. It not only "denies the essence of unitariness," but may very well impose greater substantive burdens on the school board than before the unitariness finding. *See Overton*, 834 F.2d at 1176.

In its amicus brief, the United States argues that the continuation of the court's jurisdiction in this case

via the 1972 decree was inappropriate because of the successful dismantling of the dual school system as signified by unitary status. United States' Brief at 5. This Court responded that it "was unwilling to revise Rule 60(b) to accommodate this position." Court's Opinion at 38 n.41. Rule 60(b) would hardly need revision to accommodate the legal consequences of a determination of unitary status. The court then rejects the government's argument that "[e]ven if sustained compliance with the plan is not dispositive in the unitariness inquiry, it is entitled to great weight and should create at least a *presumption* of unitary status," United States' Brief at 9 (emphasis in original). Court's Opinion at 38 n.41. While there is a difference between a presumption and relevant evidence, one would expect that sustained compliance with a plan would be highly relevant evidence in a unitariness inquiry.

Indeed, this court just above said that "the good faith of the school officials in the desegregation effort" was a unitariness[12] factor. Court's Opinion at 37. *See Brown v. Board of Educ.*, No. 87-1668, slip op. at 25 (10th Cir. filed Jun. 2, 1989 & withdrawn Jul. 19, 1989); *Morgan*, 831 F.2d at 321 (good-faith compliance with court's plan is a factor in deciding unitariness);[13]

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[12] This court indicates that a district court is not to retry issues embodied in the original judgment, when passing on a defendants' request for modification or termination of an earlier decree. Court's Opinion at 20. Presumably that admonition would encompass the 1977 unitariness determination inherent in the 1977 judgment. *See Dowell*, 677 F. Supp. at 1505 (discussing 1977 unitariness determination in judgment). Yet this court's subsequent discussion of the elements of unitariness, in the context of judging any modification sought by the defendants, is revelatory of a procedure which will replicate the original unitariness determination any time the defendants seek modification of the decree. *See* Court's Opinion at 37-38. It is patently obvious in this case that the plaintiffs are attacking the 1977 determination of unitariness as erroneous. *See* Appellants' Brief at 25 ("Plaintiffs' position is that school desegregation is required because the effects of the long-maintained dual *school* system in Oklahoma City persist.") (emphasis in original).

[13] Citation of *Morgan* in this court's discussion of post-unitariness criteria that a new student assignment plan must meet, Court's Opinion at 37-38, is inconsistent with the meaning

Ross v. Indep. School Dist., 699 F.2d 218, 226 (5th Cir. 1983) (court considered "good-faith efforts to dismantle the dual school system" and declared system unitary).[14]

In justifying its approach, this court explains that it is concerned with the future value of an injunction, not with "fix[ing] for all time equitable relief mandated by constitutional considerations on the basis of present conditions." Court's Opinion at 38 n.41. The court reasons that "[t]he extension of the government's theory portends minority citizens have no assurance of any but short-term and pyrrhic victories." *Id.*

However, during the period in which the constitutional violation is being remedied, a federal court *is* empowered to make changes in the equitable decree. The relief is not "fixe[d] for all time." Moreover, this court's concern with the absence of a remedy for minority citizens undervalues the force of 35 years of desegregation cases and the alacrity with which a

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and significance the First Circuit placed on a unitariness determination. As the First Circuit explained:

> Although the Court has produced no formula for recognizing a unitary school system, the one thing certain about unitariness is its consequences: the mandatory devolution of power to local authorities. Thus, when a court finds that discrimination has been eliminated "root and branch" from school operations, it must abdicate its supervisory role, in recognition that the "local autonomy of school districts is a vital national tradition."

Morgan, 831 F.2d at 318, 326 (quoting *Dayton II*, 433 U.S. at 410, and refusing further enforcement of student assignment portion of desegregation decree).

[14] This court notes that "[i]n Ross, despite its finding of unitariness after 12 years of court-supervised desegregation, the Fifth Circuit affirmed the district court's decision to retain jurisdiction for an additional 3 years." Court's Opinion at 38 n.40. This certainly does not support this court's retention of jurisdiction in this case after all the years that have passed since the 1977 unitariness determination. As the Fifth Circuit so recently reminded us, citing *Youngblood v. Board of Pub. Instruction*, 448 F.2d 770, 771 (5th Cir. 1971), its jurisprudence requires that a district court retain jurisdiction for 3 years after a unitariness determination, with semi-annual reports to the court by school authorities, to be followed by notice and a hearing as to why the case should not be dismissed. *Overton*, 834 F.2d at 1174-75, 1175 n.12.

fresh judicial remedy can be imposed upon a showing of purposeful discriminatory action taken by the school board.

In an effort to limit its holding, this court tells us in its revised opinion that it is merely relying upon the district court's power to enforce its equitable remedy, which "does not die until the remedy expires." Court's Opinion at 19-20 n.17. The problem with this analysis is that a remedy *imposed* and *enforced* by a court to correct racial discrimination should expire once the condition which offends the Constitution is alleviated. *Overton*, 834 F.2d at 1176. This court states that its holding is limited because the district court will cease active supervision upon a finding of unitariness, and the district court "retain[s] post-remedy authority over a school district" only "to enforce, modify, or vacate its decree." Court's Opinion at 19-20 n.17. This construct is pure sophistry. The school district will operate under a court-imposed decree, and the parties will have to repair to federal court to get the decree changed. The earlier finding of unitariness in no way lessens the obligation: the district court will never cease active supervision.

This court's laudable purpose for retaining jurisdiction is embedded in an unfortunate rationale which assumes that the arduous gains in racial equality will be lost should the school board be freed of federal control. The Fifth Circuit has addressed the same argument, rejecting the rationale of *Dowell*, 795 F.2d at 1516:

> **The argument's essence is that school districts that have intentionally discriminated are not to be trusted with the freedom of the Constitution. It rests upon a fear that the fourteenth amendment, proscribing as it does only purposeful discrimination, inadequately protects desegregation gains, at least at the hands of a former wrongdoer.**

> We are not persuaded. Whatever the power of Congress to so circumscribe the freedom of state actors, such as not requiring proof of purposeful discrimination in employment, the contended for judicial rule is here a heady call for raw judicial power. It is not that we deny the risk; the risk of wrong decision is inherent in the freedom to choose, and we are not so naive as to believe that we are no longer vulnerable to racism, if such insights are to overtly inform our judgment.

Overton, 834 F.2d at 1176. Though there be a risk, it is a risk which must be taken if ever a local school system is to function independently.

It might appear that this court's perpetual supervision of the school board has been vindicated here, because the school board, incorrectly believing it was free of federal control, enacted a neighborhood school plan which resulted in 11 out of 64 schools having a virtually one-race and black enrollment. However, as discussed below, the district court considered and rejected this circumstantial evidence of segregative intent, given the golconda of contrary evidence offered by the school board. Significantly, the school board has retained elements of the Finger Plan at all but the elementary level (1-4), and has taken other steps which certainly suggest an absence of segregative intent. Approximate racial balance is retained through busing in grades 5-12. The district court's decision rests upon ample evidence; the points raised by this court go to the weight of the evidence, not its sufficiency.

V.

Apart from the clearly erroneous standard which governs our review of the district court's factual findings concerning unitariness, *Riddick*, 784 F.2d at 533, it is important to understand the importance of intent. After informing us that once a decree is in place, "the

intent of the defendants has little, if any, relevance," Court's Opinion at 18, the court devotes a significant portion of its opinion to discussing intent. *See* Court's Opinion at 45-49.

The lifting of the decree should be the natural result of attaining unitary status. Thereafter, the basis for a system-wide remedy should be another intentional violation of the Constitution by school officials. The district court found that the only evidence which was indicative of segregative intent was disproportionate impact upon some black students. *Dowell*, 677 F. Supp. at 1517. The district court, relying on *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977), and *Dayton II*, 443 U.S. at 536 n.9, declined to find segregative intent based upon the attendance patterns of the plan.

Reviewing the trial transcript, this court perceives that the district court's focus was too narrow and that it "overlooked the broader inquiry mandated by *Swann*." Court's Opinion at 46. Of course, the cases this court relies upon involve the affirmative duty to desegregate dual school systems. This court also relies upon *Diaz v. San Jose Unified School Dist.*, 733 F.2d 660, 666 (9th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985), involving a California state-law affirmative duty to desegregate *regardless* of the cause of segregation. No such state law is involved in this case, and the affirmative duty to desegregate has been accomplished, as evidenced by the repeated findings of unitary status. *See Dowell*, 795 F.2d at 1522 (1977 unitariness finding binding); *Dowell*, 677 F. Supp. at 1515-19 (system has retained unitariness from 1977 to present). Finally, this court quotes the district court decision in *Keyes*, 609 F. Supp. 1491, now on appeal, *see supra* note 8, which seems to say that the motivations and good faith of board members or school administrators is not relevant in deciding institutional intent. *See* Court's Opinion at 47. According to this court, only circumstantial evidence is available. *Id.* at 45-46 n.49, 47.

This is too categorical a view of the intent inquiry. Such an approach essentially makes a credibility determination in advance and, of course, credibility is properly left to the trier of fact, every time. Because the school district is directed by its board and acts through its agents (personnel), the district court certainly could consider testimony concerning whether the neighborhood school plan was enacted with segregative intent, just as it can consider good faith compliance with a desegregation plan in deciding unitariness. Had some school administrator testified that segregative intent motivated the plan, such testimony certainly would be relevant. In addition to the motivation for adoption of the plan, the district court also was required to and did consider the effect of the plan. Finally, in complying with this court's directive in *Dowell*, 795 F.2d at 1522-23, the court attempted to ascertain whether it was likely that a return to a dual system was imminent should the 1972 decree be dissolved.[15]

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[15] The district court is criticized for asking various witnesses whether the board adopted its neighborhood school plan with discriminatory intent, whether the school district was being operated in a unitary fashion and whether it was likely that the school district would return to a dual system if federal control were relinquished. Court's Opinion at 45-47, 45-46 n.49, 46-47 n.50. This court tells us that "[t]he issue of unitariness is a matter which only the court can decide." *Id.* at 45-46 n.49. So true of every issue in a bench trial. Unitariness is a factual finding made by the district court and reviewed by the appellate court under the clearly erroneous standard. *See Dayton II*, 443 U.S. at 534, 534 n.8; *Riddick*, 784 F.2d at 533; *see also Jenkins v. Missouri*, 807 F.2d 657, 666-68 (8th Cir. 1986) (en banc).

The district court was attempting to determine the motivation for the plan, whether school authorities were sensitive to their constitutional obligation to operate a unitary school district and whether lifting of the decree was likely to be accompanied by a return to the former dual school system. *See Dowell*, 677 F. Supp. at 1524 (finding that current school board "is conscientiously oriented to its duty to operate a unitary school system"). In accordance with *Keyes*, 413 U.S. at 196, the district court also was seeking direct evidence of staff and community attitudes concerning the school system. *Dowell*, 677 F. Supp. at 1518 (citing *Keyes*). Had the district court based its entire decision upon only the predictable responses to these questions, there might be a basis for rejecting its factual findings. But that most certainly is not the case. The district court considered the circumstantial evidence of segregative intent but decided the other way, given adequate evidence to the contrary. *Dowell*, 677 F. Supp. at 1509-10 (student assignment); *id.* 1517 (neighborhood attendance zones), *id.* at 1518-19 (faculty/staff assignment).

In its discussion of the lack of discriminatory intent underlying the neighborhood plan, the district court considered the testimony of plaintiffs' expert Dr. Marylee Taylor, who testified concerning "the longstanding impact of official policies of segregation and discrimination, institutional racism, and prejudice as reflected in areas such as residential patterns and attitudes toward school desegregation." Rec. vol. I, doc. 17, app. E at 3 (Pretrial Order, Plaintiffs' Witness List). After defense counsel ascertained that Dr. Taylor's testimony incorporated her three day visit to Oklahoma City, the following occurred on cross-examination:

Mr. Day:	Dr. Taylor, it sounds to me from listening to your testimony that you have reviewed a substantial amount of the evidence in this case; is that correct?
Dr. Taylor:	I have – I have certainly reviewed some of the evidence in this case. Yes.
Mr. Day:	And including prior case decisions and things of that nature.
Dr. Taylor:	Yes.
Mr. Day:	You've reviewed the K-4 plan, the Finger Plan and those sorts of things; correct?
Dr. Taylor:	Yes.
Mr. Day:	Based upon your educational background and experience and your review of the facts in this case, you don't feel that the Oklahoma City Board of Education adopted this plan with the intent to discriminate against blacks; do you?
Dr. Taylor:	I have no evidence of that at all. I did not mean to suggest it.

Rec. vol. VIII at 1237-38. This court tells us that the district court could not consider this last response by Dr. Taylor as supporting an absence of segregative intent by the school board because to do so would be to take the answer "out of context" and because Mr. Day's question which elicited it "is a non sequitur." Court's Opinion at 46-47, 46-47 n.50. Both reasons given by the court are without merit.

Given the scope of Dr. Taylor's testimony, the district court could accept her conclusion concerning an absence of segregative intent by the school board in enacting the neighborhood plan, while rejecting her theory, given all of the evidence to the contrary, that the 1972 Finger Plan had merely suspended the impact of earlier official discrimination and that linking schools to housing with a neighborhood plan recreated "the impact of earlier official discrimination in the schools." *See* rec. vol. VIII at 1225. In other words, the district court could find that the school system had changed since the 1972 decree and that the dual system and its vestiges had been eliminated.

Likewise the district court was not in error for failing to recognize a non sequitur contained in Mr. Day's last question, at least as the term is commonly understood. A non sequitur is "an inference or a conclusion that does not follow from the premises," or "a

The law requires the plaintiffs to prove discriminatory purpose. As the Supreme Court has explained "[t]he school desegregation cases have . . . adhered to the basic equal protection principle that the invidious

quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 240 (1976). "[D]isparate impact and foreseeable consequences, without more, do not establish a constitutional violation . . . [But] actions having foreseeable and anticipated disparate impact are relevant to prove the ultimate fact, forbidden purpose." *Columbus*, 443 U.S. at 464. A district court may consider a school board's enactment of a neighborhood school plan which may lead to racial imbalance, as one factor among many, in deciding, " 'whether an inference of segregative intent should be drawn.' " *Id.* at 465 (quoting *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229, 255 (S.D. Ohio 1977), *aff'd in part and remanded in part*, 583 F.2d 787 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979)). But "[t]he inference is permissible, not mandatory." *Higgins v. Board of Educ.*, 508 F.2d 779, 793 (6th Cir. 1974); *see also Alexander v. Youngstown Bd. of Educ.*, 675 F.2d 787, 792-93 (6th Cir. 1982); *Spangler*, 611 F.2d at 1245 ("A policy favoring neighborhood schools is not synonymous with an intent to violate the constitution") (Kennedy, J., concurring). Thus, a district court is not *required* to infer segregative intent when there is racial imbalance in some schools. *Id.*

The district court's task concerning intent has been summarized by the Sixth Circuit:

> It is thus the duty of the District Court to determine whether, on the facts of a particular case, an inference of segregative intent should be drawn. The impact of the challenged official conduct is an important starting point. Other evidentiary sources available to the fact-finder include the historical background of that conduct, the specific events leading up to it, and the administrative record, particularly where there are contemporaneous statements by members of the decisionmaking body, minutes of its meetings, or reports.

Alexander, 675 F.2d at 792. The district court in this case specifically considered the history of the enactment of the neighborhood plan and found an absence of segregative intent. *Dowell*, 677 F. Supp. at 1513. Reinforcing this finding is the district court's considered analysis of the documents and testimony concerning the enactment of the neighborhood plan.

Without question, this court's principal concern is "the emergence of thirty-two effectively one-race schools." Court's Opinion at 44. However, the statistic is inflated and other factors must be considered. *Spangler*, 611 F.2d at 1245 (Kennedy, J., concurring). To be sure, adoption of an elementary assignment plan in a former *de jure* system which (1) uses existing neighborhood boundaries which plainly were not drawn for maximum integration, and (2) results in 11 virtually one-race black schools with consequent rise of the system-wide black versus non-black dissimilarity index, from .24 to .39,[16] and an even more pronounced

statement containing an illogical conclusion." *Random House Dictionary of the English Language* 1317 (2d unabr. ed. 1987). Here, the conclusion propounded (an absence of segregative intent concerning enactment of the neighborhood plan) was based upon the premise that Dr. Taylor's education, experience and review of the evidence in this case would permit her to detect any racism inherent in the enactment of the plan. Dr. Taylor was offered as an expert witness "in social psychology and the study of race relations and racial attitudes." Rec. vol. VIII at 1216. The question was perfectly appropriate and her answer surprising given the context of her testimony.

[16] The dissimilarity index and the exposure index measure the degree of integration in a school system. *Dowell*, 677 F. Supp. at 1508. There is an inverse relationship between the degree of integration and the value of the dissimilarity index; the higher the dissimilarity index, the lower the degree of integration. Conversely, there is a direct relationship between the degree of integration and the exposure index; the higher the exposure index, the higher the degree of integration.

Before the Finger Plan was instituted, the dissimilarity index for the system in 1971 was .78; in 1984, it was .24; and with the introduction of neighborhood schools the index rose to .38 in 1985. The dissimilarity index does not represent "the ratio of blacks to non-blacks," Court's Opinion at 27, rather it is the number of students who would have to be reassigned so that each school would have the district-wide proportion of black student enrollment, divided by the number of students who would have to be reassigned if the district

rise in the elementary black versus non-black dissimilarity index from .24 to .57,[17] *Dowell*, 677 F. Supp. at 1508-09, creates a permissible inference of segregative intent. So too does the assignment of greater numbers

were completely segregated. F. Welch & A. Light, *New Evidence on School Desegregation* – U.S. Comm'n on Civil Rights Clearinghouse Pub. No. 92, 37 (1987) [hereinafter cited as *Welch & Light*]; def. exs. 44 & 45; rec. vol. II at 127-28. Below is a chart including the dissimilarity and exposure indices, together with other information about the school system.

Year	Enrollment	Percent Black	Dissimilarity Index	Exposure Index
1970	71,089	22.9	0.817	0.182
1971	68,840	23.4	0.780	0.222
1972	60,674	26.4	0.277	0.669
1973	54,196	26.7	0.255	0.677
1974	52,143	28.3	0.236	0.670
1975	50,162	29.7	0.246	0.651
1976	47,941	31.1	0.254	0.638
1977	46,274	32.3	0.270	0.619
1978	42,933	33.1	0.245	0.619
1979	42,471	34.8	0.267	0.594
1980	40,961	35.3	0.230	0.603
1981	40,777	35.5	0.233	0.596
1982	41,427	35.5	0.244	0.592
1983	40,513	36.7	0.234	0.584
1984	40,373	38.3	0.244	0.563
1985	40,174	38.6	0.377	0.464
1986	39,837	39.3	0.389	0.453

Def. ex. 45. The district court noted that th e Oklahoma City system experienced the eighth largest reduction in the dissimilarity index out of 125 school districts, prior to introduction of the neighborhood plan. *Dowell*, 677 F. Supp. at 1508; *Welch & Light* at 41; rec. vol. II at 131. The district court then relied upon a rank order comparison of dissimilarity index values for comparably sized central city school districts. *Dowell*, 677 F. Supp. at 1508-09; *see also* rec. vol. III at 193-94. It should be remembered that the dissimilarity index is a measure of racial balance, rec. vol. II at 129; vol. III at 269, and strict racial balance is not a constitutional requirement, *Swann*, 402 U.S. at 24-25. Also, Dr. Welch suggested a limitation in comparing districts for integration based on the dissimilarity index. Concerning his desegregation study for the United States Commission on Civil Rights, *Welch & Light* at 2-3, he said:

> We used the dissimilarity index primarily as a vehicle for examining school districts through time. Table 13 . . . as we have discussed, is one that simply takes some extreme districts and says, "which districts experienced the largest change . . . over the period of time?"
>
> But we're not trying, typically, in this study to compare one district and say, "This district is particularly well integrated while the other is not," so much as saying "what are the sources of change within districts?" and "what are the plan types that led to the sources of change?"

Rec. vol. II at 129-30; *accord Welch & Light* at 38 ("The fact that the dissimilarity index is useful in describing changes within a district does not imply that it is useful in comparing districts.").

[17] Before the Finger Plan was instituted, the dissimilarity index for the elementary system in 1971 was .83; in 1984, it was .24; and with the introduction of neighborhood schools the index rose to .56 in 1985. A chart including the elementary dissimilarity and exposure indices, together with other information concerning elementary schools, follows:

Year	Enrollment	Percent Black	Dissimilarity Index	Exposure Index
1970	40,205	23.5	0.888	0.106
1971	38,121	23.5	0.833	0.157
1972	23,744	22.8	0.191	0.737
1973	20,510	23.1	0.231	0.714
1974	19,711	23.0	0.219	0.731
1975	19,143	23.5	0.238	0.719
1976	18,793	24.9	0.237	0.705
1977	18,857	26.4	0.268	0.681
1978	18,115	28.0	0.228	0.675
1979	17,897	28.7	0.217	0.666
1980	17,119	29.6	0.190	0.667
1981	17,062	29.1	0.195	0.666
1982	17,457	28.7	0.203	0.671
1983	17,142	30.4	0.199	0.655
1984	17,285	32.4	0.240	0.622
1985	18,283	36.0	0.564	0.354
1986	18,399	36.6	0.565	0.352

Def. ex. 44

of black faculty/staff to schools with predominantly black enrollments. The district court clearly was aware of these factors and "sharply focused on the racial composition of the predominantly black schools which came into being as a result of the neighborhood

plan," *Dowell*, 677 F. Supp. at 1517, as well as the faculty/staff imbalance. *Id.* at 1518-19. Although the facts in this case might logically support a judgment for either side, our task is not to decide the case anew. *Alexander*, 675 F.2d at 801.

VI.

Relevant factors led the district court to conclude that there was an absence of segregative intent on the part of the school board and that the system remained unitary. A neighborhood school policy is not, in and of itself, violative of the fourteenth amendment. *Crawford v. Board of Educ.*, 458 U.S. 527, 537 n.15 (1982). Just as equal educational opportunity is a national policy, so too is neighborhood schooling. 20 U.S.C. § 1701.

A.

The impetus for the neighborhood plan at the elementary level was the board's determination that the 1972 Finger Plan, as modified over the years, was structurally inadequate to meet the educational and equitable objectives of the district in grades 1-5. As enacted and revised, the neighborhood plan had several objectives, including 1) maintaining a unitary system, 2) establishing K-4 schools in the northeast section where none existed, 3) maintaining K-4 neighborhood schools with stability, 4) increasing pride and parental involvement in the elementary schools, and 5) continuing an integrated school district in an urban setting. Pl. hearing ex. 1 (Def. ex. 96, *see* rec. vol. I, doc. 17, app. D at 12, 29), § 1 at 2 (1985-86 student assignment plan). The school board expected the following advantages: 1) neighborhood schools, 2) fifth-year centers in all areas, not just the northeast quadrant, 3) reduction of busing, 4) program improvement, including increased participation in extracurricular activities, 5) increased parental participation, and 6) increased community involvement and support. *Id.*; rec. vol. III

at 347. Obviously, the neighborhood assignment plan meets certain of these objectives better than others. It is decidedly ineffective in promoting integration in some schools given the 11 90%+ black schools.

In the simplest analysis, the school board appears to have elevated the educational value of student assignment based on proximity over the social value of mandatory integration in grades 1-4.[18] The school board viewed the advantages of neighborhood schooling as outweighing the negative effect that this program has on the racial balance in some elementary schools. From a personal perspective, we may regard this to be a regrettable choice;[19] however, once a *de*

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[18] Kindergarten students under the 1972 Finger Plan were permitted to attend schools of choice. Pl ex. 6, *reproduced in* Appellants' Addendum to Brief at 19. Dr. Foster's proposed desegregation plans did not include kindergarten students in reassignments. Pl. ex. 57 at 1. Thus, it would appear that plaintiffs do not object to the present 5 one-race black, and 6 virtually one-race black, kindergartens at 11 schools. For example, in 1986-87, the 11 virtually one-race black K-4 elementary schools had the following kindergarten enrollments:

School	Black	Other	Total	% Black
Creston Hills	44	1	45	97.8
Dewey	59	0	59	100.0
Edwards	61	1	62	98.4
Garden Oaks	34	0	34	100.0
King	67	2	69	97.1
Lincoln	68	0	68	100.0
Longfellow	48	0	48	100.0
North Highland	72	2	74	97.3
Parker	57	2	59	96.6
Polk	58	2	60	96.7
Truman	76	0	76	100.0

Pl. ex 27, *reproduced in* Appellants' Addendum to Brief at 187-88.

[19] As indicated by Dr. Biscoe, rec. vol. III at 326, there is very mixed empirical evidence concerning the benefits of an integrated education in terms of enhanced student achievement and improved interracial attitudes and relations. *See* 3 D. Levine, Desegregation in Schools, *International Encyclopedia of Education* 1368-71 (T. Husen & T. Postlethwaite 2d ed. 1985).

jure school system and its vestiges are eliminated, the Constitution empowers local authorities to make such choices in the absence of segregative purpose.[20] In the factually similar *Riddick* case, 784 F.2d at 521, the Fourth Circuit upheld a unitary school district's neighborhood plan where 40% of the minority students attended ten 90%+ minority schools. *Id.* at 527 n.7 (40% derived from data presented in footnote 7). Moreover, even in the remedial phase, which we are long past, a court may not order strict racial balancing or quotas. *Swann*, 402 U.S. at 23-24.

B.

As acknowledged by both sides and found by the trial court, there were inequities associated with the

Plaintiffs' expert Dr. Crain testified that segregated schools inhibit learning, but acknowledged that the studies conflicted concerning the effects of desegregation on achievement. Rec. vol. III at 971-72. Defendants' expert Dr. Walberg testified, based on a variety of studies "that racial composition of the school is irrelevant to how much children learn in school, and no particular racial composition, such as zero, ten, fifty, ninety, or a hundred makes important differences for how much children learn in school." Rec. vol. VI at 913-14. He indicated that parental involvement and what he termed the "curriculum of the home" is important for academic achievement. *Id.* at 916. Defendants' expert Dr. Sampson testified that certain home values, such as consistent parental authority, parent-child interaction, and monitoring and reinforcement of children by parents, rather than race or economic status, determine academic achievement. Rec. vol. IX at 1455, 1458. Dr. Sampson testified that "if the purpose of the schools is education," and if an effective schools program was in place, he would not be concerned with 90%+ black schools. *Id.* at 1461.

Dr. Sampson relied in part upon his research concerning 6 all-black parochial schools located in very poor black communities. Rec. vol. IX at 1456. Only about half the students are Catholic. *Id.* at 1457. Dr. Sampson looked at why these schools were so successful and concluded that they have characteristics associated with effective schools and the children are motivated at home. *Id.* at 1457-58. This district stresses effective schools concepts and greater parental involvement in an effort to improve educational outcome. In my view, the district court could consider this evidence as indicative of a lack of segregative intent. *See Dowell*, 677 F. Supp. at 1524. This court disagrees. See Court's Opinion at 48-49 n.51.

[20] "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." *The Federalist No. 78*, at 507-08 (A. Hamilton) (Mod. Lib. ed.) (emphasis in original). An inherent limitation of judicial intervention in the educational process is the lack of judicial accountability for the results.

"stand-alone" feature. *Dowell*, 677 F. Supp. at 1514. These inequities were revisited when the school board voted 4-3 to make Bodine a stand-alone school. Analyzing the events which led up to the neighborhood plan for extreme and unexpected hardship to the school board, Court's Opinion at 32, this court concludes that the "stand-alone feature . . . . emerged from the evidence as a matter of speculation tied to capacity problems, budget constraints, and local politics." *Id.* at 35; *see also id.* at 34. This implies that the neighborhood plan was motivated by concerns that were not bona fide.

As of 1983-84, there were three K-4 stand-alone schools, Harrison, Edgemere and Western Village, with Rockwood joining the list as of 1984-85. Def. ex. 76, *reproduced in* Appellants' Addendum to Brief at 332, 345. At the same time there were two K-5 stand-alones: Arcadia, because of location and Horace Mann, because of racial balance. *Id.* at 347. The board then voted to make Bodine a K-5 stand-alone school. *Id.* at 351.

Initially, the stand-alone provision in the Finger Plan was to operate when the black student percentage in a neighborhood attendance zone exceeded 10%, but was less than 35%. Pl. ex. 6, *reproduced in* Appellants' Addendum to Brief at 20. In the 1972-73 school year, there were 11 stand-alone schools, not all of which met the above criteria.[21] Pl. ex. 13, *reproduced*

[21] The original stand-alone schools, together with the percentage of black enrollment, were: 1) Arcadia, 68.4% (geographically isolated), 2) Columbus, 19.0%; 3) Edgemere, 20.3%, 4) Horace Mann, 21.6%, 5) Mark Twain, 26.6%, 6) Nichols Hills, 31.2%, 7) North Highland, 50.0%, 8) Riverside, 15.2%, 9) Ross, 27.7%, 10) Shidler, 44.8%, and 11) Stand Watie 26.7%. Pl. ex. 13, *reproduced in* Appellants' Addendum to Brief at 98. Four (Columbus, Ross, Shidler, Stand Watie) were located south of the Canadian River. Four (Edgemere, Horace Mann, Mark Twain, Riverside) were located north of the river in the central portion of the area, and three (Arcadia, Nichols Hills and North Highland) were located in the far northern portion of the area. *See* Pl. ex 3; Pl. ex. 17, *reproduced in* Appellants' Addendum to Brief at 51.

in Appellants' Addendum to Brief at 98. The criteria changed over the years, but the concept was retained. The school's planning department determined initial eligibility for K-4 and K-5 stand-along status based on whether the black student percentage of the neighborhood attendance area would result in a school which was plus or minus (±) 10% or ±15% (depending upon school size) of the district average of black students for the particular grade configuration, i.e. K-4 or K-5. *See* def. ex. 72, *reproduced in* Appellants' Addendum to Brief at 275-76. Thus, as of April 1984, the planning department identified 11 schools which were eligible for K-4 stand-alone status. All but one of these schools were eligible, in the alternative, for K-5 stand-alone status in addition to 3 other schools, bringing the total number of schools eligible for K-5 stand-alone status to 13.[22] *Id.* at 276; *accord* rec. vol. IV at 427. The planning department then identified 9 schools to be considered as potential K-5 stand-alone sites. *See* def. ex. 72, *reproduced in* Appellants' Addendum to Brief at 275.

Dr. Welch also considered the geographic pattern of schools eligible for stand-alone status solely on the basis of whether the racial composition of an elementary attendance area was ±15% of the system-wide black average of 35%. Rec. vol. III at 216-218. He noted

[22] These schools eligible for K-5 stand-alone status for 1984-85 were Arcadia, Bodine, Britton, Edgemere, Eugene Field, Gatewood, Horace Mann, Putnam Heights, Rockwood, Telstar, Western Village, Willow Brook and Wilson. Def. ex. 72, *reproduced in* Appellants' Addendum to Brief at 276. Two (Bodine (SE), Rockwood (SW)) were located south of the Canadian River; two (Telstar (NE) and Willow Brook (NE)) were located south of the river, but in the northeast Star-Spencer area of the district; six (Edgemere, Eugene Field, Gatewood, Horace Mann, Putnam Heights, Wilson) were located north of the river adjacent to the northeast quadrant; three (Arcadia (NE), Britton (NW) and which included the Nichols Hills and Lone Star attendance areas, Western Village (NW)) were north of the river and in the far northern portion of the main geographic area. *See* Pl. ex. 3; Pl. ex. 7, *reproduced in* Appellants' Addendum to Brief at 51. Thus, although these 13 schools were located throughout the district, the majority of the schools formed a band more or less in the middle of the district.

that the location of these schools supported the contention that there had been diffusion of the black population from the northeast quadrant.

The district court correctly noted that three expert witnesses in the case acknowledged that the 1972 Finger Plan, including the stand-alone feature, was now inequitable because of demographic change. *Dowell*, 677 F. Supp. at 1514. Defendants' expert Dr. Welch testified that "it's just not a plan that was designed to withstand the kind of demographic change that occurred in this district." Rec. vol. III at 220. Quite apart from Dr. Welch's projections indicating that more schools would be eligible for stand-alone status by 1995,[23] he testified that there are inherent limita-

[23] This court apparently finds the district court's factual findings concerning the projected number of stand-alone schools and demographic change clearly erroneous, partly because the statistical forecasts developed by defendants' expert Dr. Welch indicated that some school attendance areas, which are predominantly black, may decline from 100% black in 1986 to 93.2% black in 1995 (a drop of 6.8%) or from 93.2% black in 1986 to 89.6% black in 1995 (a drop of 2.7%). *See* Court's Opinion at 9, 28, 28 n.31, 35; def. ex. 11 at 2.

The court contends that Dr. Welch's 1995 projections should be rejected as clearly erroneous because Dr. Welch gave testimony "directly controverting that of Dr. Clark." Court's Opinion at 28. Dr. Clark testified that "there's a very, very small proportion of white households that will move into neighborhoods that are heavily minority," and that concentrated minority residential areas are unlikely to change. Rec. vol. II at 105-06. The court also appears concerned with the statistical methodology used by Dr. Welch. Court's Opinion at 28-29. When the testimony is unraveled, it is apparent that Dr. Welch's testimony is a sufficient basis for the district court's findings; this court is merely reweighing the evidence.

Dr. Welch used a three step procedure to forecast the percent black in each attendance area: 1) time series regression to forecast the district-wide black student percentage, 2) time series regression to forecast the total number of students in each attendance area, and 3) a complicated procedure to allocate the black students to particular areas based upon the distribution of blacks in the particular attendance areas and adjacent areas. Rec. vol. III at 236, 242-43, 249.

Concerning the second step, Dr. Welch used two models, one linear and the other exponential, to predict enrollment within the attendance areas. *Id.* at 238-39. This was done so as to most accurately extrapolate current enrollment trends. For example, if enrollment had dropped during the most recent seven years, Dr. Welch selected the model that would project a continuing drop. *Id.* at 241; *see also id.* at 245. Dr. Welch testified that demographers routinely do this in making predictions — "[p]eople who are doing forecasting

tions to the plan: 1) it was designed for an elementary student population that was 20%, not 40% black, 2) as more schools qualify for stand-alone status, busing distances for those still bused will be longer, and 3)

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use a variety of models." *Id.* at 241.

Concerning the third step, plaintiffs' counsel, Mr. Chachkin, asked why Dr. Welch did not use trend regression to forecast the *percentage* of blacks in each attendance area based upon the past percentage of blacks relative to total enrollment. The question comes down to why Dr. Welch "used a *ratio* rather than a *percentage*" in his third step. *Id.* at 249 (emphasis added). Dr. Welch responded that there were two reasons why he did not proceed in the third step as plaintiffs' counsel suggested: 1) the results would not have been consistent, and 2) such an approach "would not have added to reasonable behavior at a district-wide level." *Id.* at 243. It was in response to this question that Dr. Welch testified that he wanted an internally consistent forecast because someone would be cross-examining him. *See* Court's Opinion at 28 (quoting rec. vol. III at 244).

This court has blended the points brought out in cross-examination (concerning the second and third steps of the statistical model) and given a somewhat misleading picture. *Id.* The court says:

> Noting that he used two different methods for calculating the 1974 to 1986 figures and the 1986 to 1995 figures, Dr. Welch conceded: "And I really didn't want an inconsistent forecast. I thought someone would be cross-examining me. And so I designed the procedure to be completely internally consistent."

Id. at 28. In my view, Dr. Welch should not be faulted for using those procedures which are likely to result in more accurate forecasts. Rec. vol. III at 246.

Dr. Welch was hardly evasive concerning the limitations of historical forecasting which is used routinely: "There is literally no scientific basis for assuming that the world regenerates itself." *Id.* at 241. He admitted that, given more time, he could generate measures of reliability and improve the procedure. *Id.* at 246. In sum, he said:

> Dr. Welch: "How wide are the intervals?" I can't guess, but I think, it would be appropriate to call these numbers guesstimates, that I think they're straight-faced, they come from a serious procedure that's applied conscientiously, there's no result in terms of configuration that I'm working to. I'm trying to describe the data. I think I've done that.
>
> . . .
>
> But you certainly don't want to look at a number like . . . . 193 [the projected black percentage for Lee elementary in 1995, Def. ex. 11 at 2] and see the "3," and when you see the "9," you probably want to say .15 to .25. That's — I mean, they're an indication."

Id. Thus, the point estimates he generated for predominantly black schools are within a range of accuracy. When questioned by Mr. Chachkin about this Dr. Welch explained that regression estimators characteristically fail to predict extremes. *Id.* at 254.

schools housing fifth-year centers will be forced to close if enrollment declines due to fifth grade students attending stand-alone schools. *Id.* at 219-20, 225-226. Add to that, the plan does not consider the presence of other minority groups. Rec. vol. III at 312-22 (Dr. Biscoe). Dr. Welch's forecasts for 1995 indicated that more schools would qualify for stand-alone status. *Id.* at 224; *see supra* note 23.

School board member Dr. Clyde Muse was troubled by the implications of an increasing number of schools eligible for stand-alone status. Rec. vol. IV at 424-428. He believed that because of the central location of many of the potential stand-alone schools, busing distances for some students would increase and the closing of some fifth-year centers in the northeastern part of the district became a real possibility. *Id.* at 425-26. Plaintiffs' expert Dr. Foster agreed with Dr. Muse concerning the disproportionate impact of stand-alone schools. Rec. vol. VIII at 1266-67. Dr. Muse described the fifth year centers as "the only elementary schools in the black community." *Id.* He recognized that the "stand-alone" feature of the plan had to be eliminated because the board would always be pressured to create stand-alone neighborhood schools in qualifying neighborhoods, perhaps at the expense of the non-stand-alone components of the elementary system. *Id.* Board member Hill put it this way: "Our patrons, our communities, had been told since '72 that, if they became integrated, they could have a neighborhood school, and they could not understand why they had followed exactly what the court said and the board was not giving them their K-5 schools." Rec. vol. IV at 528. The comments of Dr. Muse and Mrs. Hill also

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With the above in mind, the district court was hardly required to reject Dr. Welch's forecasting and its implications merely because the forecasting indicated that some attendance areas may be 93.2% black when it is more likely that they will be 100% black. To require absolute accuracy in forecasting is an impossibility. Moreover, the forecast is certainly consistent with the present racial composition of those neighborhoods. This court's problems with the statistical forecasting go to the weight it should be accorded, not its sufficiency.

are corroborated by the minutes of the school board meeting concerning K-5 stand-alone status for Bodine. *See* Def. ex. 76, *reproduced in* Appellants' Addendum to Brief at 348-51 (summary of hearings between interested persons and board members concerning stand-alone status for Bodine).

Another inequitable feature of the 1972 Finger Plan as implemented over the years was that black students were bused during the first four years to schools outside black residential areas, while white students were not bused until the fifth year. *See* rec. vol. VIII at 1265 (Dr. Foster). Of course, a desegregation plan may "not unfairly burden minority students." *Keyes v. School Dist. No. 1*, 521 F.2d 465, 479 (10th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976); *Higgins*, 508 F.2d at 793. Both sides are in agreement that this feature of the 1972 plan required modification.

C.

As designed and implemented, the neighborhood plan *continued* the majority-to-minority transfer option under existing Policy JCA-M. Pl. hearing ex. 1, § 1 at 4. Free transportation was provided for elementary students exercising the option. *Dowell*, 677 F. Supp. at 1523. The district court viewed this option as one attribute of a unitary system. The district court said: "In a word, parents in Oklahoma City today have a choice. No pupil of a racial minority is excluded from any school in Oklahoma City on account of race." *Id.* In a statement too sweeping, this court then says that "[t]he record does not support this assertion." Court's Opinion at 40. Does the court mean that parents do not have a choice or that minority students are being excluded from schools in the district, or both? The discussion that follows concerns the majority-to-minority transfer option and perhaps the court is questioning only the transfer option. If this court is saying that the efficacy of the transfer option is not supported by the record, that is one thing. But it is quite another

to claim that the evidence does not support an absence of the purposeful racial discrimination inherent in *excluding* a student from a public school on the basis of race. The record most certainly and repeatedly supports the contention that students are *not* excluded from the public schools on the basis of race; there has been compliance with *Brown I* and the district is *not* operating a dual system of assignment at any level.

The majority-to-minority transfer option has been described "as a useful part of every desegregation plan." *Swann*, 402 U.S. at 26. In a school district charged with an affirmative duty to desegregate, the purpose of the option is remedial. *Id.* Here, the district court recognized that retention of the option was indicative of the board's legitimate, not discriminatory, motivation in enacting the neighborhood plan. The operation of the option is not indicative of segregative intent.

This court views the district as under an affirmative duty to desegregate and is concerned that parents do not understand the option and will not "freely" exercise it. Court's Opinion at 41. The option is not new, parents were provided with a letter explaining the option, rec. vol. III at 310, 327, and I submit that the court's real concern is that a voluntary option cannot result in racially balanced schools. Obviously, if only 332 students transferred under the option in 1985-86, and 181 transferred in 1986-87, *Dowell*, 677 F. Supp. at 1523, the option will not achieve racial balance. The court's real complaint is the paternalistic notion that black parents will not choose the option.[24] *Contra* P.

[24] Plaintiff's expert Dr. Crain testified, concerning the majority-to-minority transfer option, that "it would be astonishing to expect very many blacks to volunteer for the frightening experience of sending their children across town to an all-white school." Rec. vol. VII at 1011. He indicated that only "a tiny percentage" would choose the option. *Id.* Plaintiffs' expert Dr. Foster testified that "the children who need desegregated

Gerwitz, *Choice in the Transition: School Desegregation and the Corrective Ideal* 86 Colum. L. Rev. 728, 756-77 (1986) (cited in Court's Opinion at 21 n.18; arguing that choice to attend predominantly minority school is tainted).

D.

. The district court also considered the laudable goal of increased parental and community involvement brought about by the neighborhood plan. *Dowell*, 677 F. Supp. at 1516-17. Apparently, the court views this evidence as an attempt to compensate for the lack of a unitary school system. *See* Court's Opinion at 44. Such is not the case. Instead, the evidence reinforces the lack of discriminatory intent in the enactment and implementation of the neighborhood plan. It also corroborates the testimony from school officials that increased parental involvement was a partial motivation for the plan. The court acknowledges that there was a "substantial increase in parent participation," Court's Opinion at 44 n.47, yet questions the "conflicting evidence" the district court relied upon in finding a causal link between instituting the neighborhood plan and increased parental participation. *Id.*

Despite this court's objection on hearsay grounds to Dr. Mason's testimony concerning parental involvement, *id.*, witness after witness testified based upon personal knowledge that the increased participation of parents was due to the neighborhood plan. [25] [26]

schools . . . the most[] may be the least likely to take that option." Rec. vol. VIII at 1196.

When cross examined by plaintiffs' counsel Mr. Shaw, a member of the school board, Mrs. Hermes, indicated that the district would honor the majority-to-minority transfer program even if every black parent exercised the option. Rec. vol. III at 369.

[25] *See* rec. vol. III at 339 (Dr. Biscoe indicated that "[a]ll of the data that we currently have indicates that parent involvement has increased significantly" under the operation of the plan.); *id.* at 350, 354 (Board member Hermes (1980-present) testified that PTA units increased from 15 to nearly 50 with the enactment of the plan; opportunity to participate in extracurricular activities is greater under plan); vol. IV at 429, 435 (Board member Dr. Muse (1982-86) testified that *the plan* increased community involvement and support, which

Conversely, several witnesses indicated that busing had an adverse effect on parental involvement.[27]

Defendants' expert Dr. Lane testified that an effective schools program,[27] is enhanced by a neighbor-

was one of the purposes of enacting it); *id.* at 516-20, 26 (Board president Mrs. Hill (1976 to present) testified about unsuccessful attempts to increase elementary parent involvement before implementation of neighborhood plan; school board sought to increase parental involvement); vol. V at 629-30 (Mr. Owens, a black parent in the northeast quadrant supported neighborhood plan; noted increased parental involvement with plan); *id.* at 639-43, 650-51 (Dr. White, a black parent, favored neighborhood plan because increased parental involvement expected; Dr. White formed coalition and collected 400 signatures in northeast quadrant in favor of plan); *id.* at 736-37 (Dr. Steller, school superintendent, testified that with the return of neighborhood schools parents were much more willing to participate in PTA, parent conferences and open houses); *id.* at 775-76 (Karen Leveridge, former local, state and national officer in PTA, testified that implementation of the neighborhood plan was one of the major reasons responsible for increased PTA participation); *id.* at 790-91 (Odette Scobey, principal of Truman Elementary with 27 years service, testified that parents have become more involved in helping in the classroom and attending parent conferences since the neighborhood plan was implemented); rec vol. VI at 853-55 (Robert Brown, principal of Martin Luther King Elementary, testified that parental involvement and support has increased since the enactment of the neighborhood plan); *id.* at 863 (Billie Oldham, district-wide PTA council president who organized new PTA units testified that she saw a great increase in parental involvement with the neighborhood plan); *contra* rec. vol. IX at 1413-14 (Clara Luper, high school teacher and NAACP Youth Adviser, testified that only 8 parents attended the Longfellow PTA meeting when she was a guest and that Harrison Elementary had "a very effective PTA," but that it was "mixed in with school activities."); *id.* at 1434 (Senator Porter, NAACP President, hearsay concerning effective functioning of PTA's under 1972 plan).

[26] Many black parents and school personnel supported the neighborhood plan. *See supra* note 25. Mrs. Luper, who opposed the plan, was asked about the "various positions" taken in the black community concerning the neighborhood plan at which time she questioned the motives of black school personnel, *see Dowell*, 677 F. Supp. at 1519, who supported the neighborhood plan:

> Mr. Shaw: What is your understanding concerning those positions?
> Mrs. Luper: Once again, those positions are based on who you're talking to. Throughout history, we have had people that have always been able . . . to protect their own interests.
> I noticed with a great deal of interest the employees of the board of education that were — that have testified here, but I have also noticed that those employees have never been involved in anything in this city to change conditions of black people. Now, I've noticed that, and that's really important.

hood schools program because "a neighborhood school program can insure greater parental involvement, and one of the hallmarks of an effective school is parental involvement . . . . Proximity means easy access, and that's very good, and the neighborhood school does help that." Rec. vol. VI at 897. Dr. Walberg indicated that the neighborhood reassignment plan, with its emphasis upon interaction between students, teachers and parents, contributed to the educational

Rec. vol. IX at 1415. Mrs. Luper's statement does not allow for an honest difference of opinion among blacks on the issue of the neighborhood assignment plan.

[27] In discussing the disadvantages of the proposed Foster Plan, the district court summarized its objections and mentioned cross-town busing and "the potential harms related to busing students at this tender age." *Dowell*, 677 F. Supp. at 1526. Indeed, student transportation is a significant factor in the Foster Plan. Dr. Foster estimated that 85 buses would be needed to transport 4,000 elementary students at an initial cost of $3,500,000 and a recurring cost of $982,712. Rec. vol. VIII at 1312-13. Dr. Steller disagreed with these figures, finding that 125 buses would be needed. The district court apparently agreed with Dr. Steller, finding that the total cost of Dr. Foster's plan (including the significant element of transportation) would be approximately $7.4 million the first year and $1.7 million thereafter. *Dowell*, 677 F. Supp. at 1525; rec. vol. IX at 1500.

This court paid close attention to the testimony concerning busing and implies that the desirability of busing elementary students to achieve racial balance probably ought not to be questioned yet. Court's Opinion at 30-31. Of course, in a system charged with an affirmative duty to desegregate, the Supreme Court has made it clear that busing may be an appropriate tool to liquidate a dual system and that objections to transportation will be countenanced only "when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." *Swann*, 402 U.S. at 30-31. Limitations on time and travel are a function of student age. *Id.* at 31. Without question, elementary students including four- and five-year-olds may be bused reasonable distances in order to dismantle a dual system. *Swann*, 402 U.S. at 29 n.11.

In a unitary system, however, the desirability of busing elementary 1-4 students may be questioned. Quite apart from the fact that the cost of additional transportation will divert funds from the district's educational mission and necessitate reductions in current programs, rec. vol. IX at 1502-05, Dr. Steller predicted that parental involvement would plummet. *Id.* at 1482-84.

[28] "The most important characteristics of effective schools are strong instructional leadership, a safe and orderly climate, school-wide emphasis on basic skills, high teacher expectations for student achievement, and continuous assessment of pupil progress." U.S. Dep't of Education, *What Works — Research About Teaching and Learning* 45 (1986). Dr. Hughes testified that effective schools techniques are being implemented successfully in the Oklahoma City elementary schools. Rec. vol. V at 685-88.

mission of the district. *See* rec. vol. VI at 918-22, 934. He termed it "the next logical step to improve the education of the children in the Oklahoma City Public Schools." *Id.* at 953. Dr. Steller testified that parental involvement enhances academic achievement. Rec. vol. V at 736; *accord id.* at 796 (testimony of Ms. Scobey); *see also Riddick*, 784 F.2d at 541.

E.

This court's approach to the school board's evidence is to judge it against an improper legal standard given the unitary status of the school district. This court then compounds the problem by searching the record for conflicting evidence and holding the school board to an impossible standard of proof which does not allow the school board to prevail if there is any conflicting evidence. This practice is directly contrary to the standard by which we carry out our appellate function. *Anderson*, 470 U.S. at 573-576 ("This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court."). Moreover, this court's appellate factfinding is not free from error.

Consider the conflicting trial evidence on academic achievement. This court addresses such information, Court's Opinion at 41-42, and in the context of the district's continued unitary status, comments that "there is no evidence of specific educational programs designed for those racially identifiable elementary schools to counteract the effect of low achievement in these schools." *Id.* at 42. In its revised opinion, this court then criticizes the dissent for "wad[ing] into this area." Court's Opinion at 48-49 n.51.

The district court rejected the notion that schools must be racially balanced for maximum academic

achievement. *Dowell*, 677 F. Supp. at 1523-24. In so deciding, the district court relied upon several evidentiary sources, including the school board's information indicating that the gap between black and white third graders was reduced 13% between 1985-86 and 1986-87, after introduction of the neighborhood schools program. *Id.* at 1524. While the comparison may be difficult to generalize, it is not because the test comparisons are "flawed" because "[t]he group of students studied one year is not the same studied the next year." Court's Opinion at 41-42. Dr. Steller indicated that an acceptable comparison could be made even if the students were not the same; that comparison of the same grade level is an accepted technique. Rec. vol. V at 744. Indeed, different groups of third-graders over time are implicit in the comparison. Indeed, even plaintiffs' expert Dr. Crain testified that an alternative to comparing the same group of cohorts over time is to compare different cohorts at particular grade levels. Rec. vol. VII at 1003. The district court could consider this comparison without committing clear error.

The district court also could rely upon the information that 8 of 10 neighborhood elementary schools with 90%+ black enrollments had achievement test gains which surpassed the national average for black students. *Dowell*, 677 F. Supp. at 1524. This court's observation that "gain is an elusive concept," Court's Opinion at 42 n.44, goes to the weight of this evidence; it does not render the district court's finding that the neighborhood plan is one factor which may enhance academic achievement at some schools clearly erroneous. *See* rec. vol. VI at 933-34, 946-47 (Dr. Walberg testified that neighborhood school plan, effective schools program and increased parental involvement are major causes of improvement and only slight drops at other 2 schools).

Though gain may be an elusive concept, the court does tell us that scores at 2 schools dropped. *Id.* at 42.

Does this mean that gain does not inure to the benefit of the defendants because it is elusive, but loss does? The court is merely reweighing conflicting evidence to produce different outcome. However, the court's efforts notwithstanding, the district court's ultimate finding that academic achievement will not be harmed if schools are not racially balanced is not clearly erroneous.

In the same vein, the court dismisses the effective schools program by telling us that it "is geared to the upper grades." Court's Opinion at 42. Not so. As support, this court cites Dr. Crain's testimony. *Id.* (citing Rec. vol. VII at 1004-05). Dr. Crain admitted that there was "not very strong evidence that Oklahoma City is following the national trend in which segregation is harmful to achievement." Rec. vol. VII at 1004. He attributed this to the recency of the neighborhood plan and then said that "[t]he best I can say is that certainly the new effective schools program that I've read some literature about is working in the upper grades better than it is the lower grades." *Id.* at 1004-05. Dr. Crain's *reading* about an effective schools program somewhere hardly supports the proposition that *this* program in *this* district is geared to the upper grades. To the contrary, the effective schools program appears to have been successfully implemented in the elementary grades at issue. Rec. vol. V at 685-688 (Dr. Hughes); 702-03 (Dr. Steller); vol. VI at 880-81 (Dr. Lane).

Likewise, this court tells us that the effective schools program is "tied to budgetary constraints experienced by the District." Court's Opinion at 42. For this proposition, the court cites Dr. Lane's testimony where he was asked how Oklahoma City compares to other districts "in implementing an effective schools program and in carrying out their instructional philosophy." Rec. vol. VI at 881. Dr. Lane replied that the district compared favorably. *Id.* He said: "I have found that this district, laboring under tremendous fiscal

constraints, has made giant strides." *Id.* Such a statement hardly links the effective schools program to the district's fiscal constraints. Likewise, the court is concerned with the absence of specific programs designed for the racially identifiable elementary schools. Court's Opinion at 42. However, Dr. Hughes testified that one of the major purposes of the effective schools program is to narrow the differences in achievement based upon socioeconomic and racial differences. *See* rec. vol. V at 688. Indeed, under the proposed Foster Plan B, 24% *fewer* low income students (710) will be eligible for federally funded remedial math and reading help given the program requirements. Rec. vol. IX at 1496 (Dr. Steller).

The district court's finding concerning increased parental involvement caused by the neighborhood plan, *Dowell*, 677 F. Supp. at 1516-17, and the efforts of the district to provide improved educational opportunity for all, *id.* at 1522-24, are not clearly erroneous. These findings, along with others, support the ultimate factual finding of continued unitary status.

VII.

Regarding faculty/staff assignment, this court says that the district court "did not address plaintiffs' exhibits 48, 50, 52 and 54[,]" which show, to use the court's oxymoron, "the growing parity of imbalance" between faculty and students. Court's Opinion at 39. This court relied on plaintiffs' exhibit 54, prepared by plaintiffs' counsel, rec. vol. VIII at 1270, and introduced through Dr. Foster, which tends to show that schools with higher black enrollments have more

black teachers.[27] Without question, the district court was aware of this phenomenon, *see Dowell*, 677 F. Supp. at 1518, but it declined to infer segregative intent. After the district enacted the neighborhood

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[29]

Elementary Schools' Enrollment and Faculty Racial Composition (ranked by % Black Faculty) 1986-87

Elementary School	Black Teachers	Total Teachers	% Black Teachers	% Black Students
Edwards	5.9	8.4	70	99.5
Telstar	9.0	13.8	65	59.7
Lincoln	8.1	12.6	64	99.3
Garden Oaks	4.5	9.0	50	98.3
Polk	6.0	13.0	46	98.8
Parker	7.5	16.3	46	96.9
Truman	7.5	17.0	44	99.7
King	5.9	13.6	43	98.9
Creston Hills	4.0	9.4	43	99.0
Dewey	4.0	9.5	42	98.4
Willow Brook	6.8	16.3	42	51.5
Hawthorne	5.8	14.3	41	19.2
Edgemere	5.8	14.8	39	51.3
Longfellow	4.6	12.1	38	99.1
Westwood	4.0	10.5	38	20.0
Harrison	3.0	7.9	38	49.4
North Highland	5.6	14.6	38	97.5
Rockwood	7.0	19.5	36	41.5
Shidler	4.6	13.1	35	37.1
Mark Twain	2.2	6.2	35	9.7
Horace Mann	3.0	9.0	33	35.2
Putnam Heights	4.0	12.7	31	34.8
Kaiser	2.5	8.0	31	18.1
Star	5.0	16.0	31	61.4
Shields Heights	5.0	16.5	30	3.9
Quail Creek	3.0	10.0	30	13.1
Spencer	5.0	16.6	30	76.3
Heronville	4.0	13.6	29	8.9
Ridgeview	3.6	12.6	29	17.1
Hayes	4.5	15.5	29	11.2
Monroe	4.5	16.5	27	15.9
Gatewood	3.0	11.3	27	25.7
Columbus	4.8	17.8	27	15.2

plan, it became necessary to reassign 500 teachers. Rec. vol. IV at 548. In a negotiated agreement with the teachers' union, teachers were allowed to indicate preferences as to assignment, with senior faculty receiving first preference. *Id.* at 1518. The executive director of personnel testified that reten-

Elementary School	Black Teachers	Total Teachers	% Black Teachers	% Black Students
Wheeler	3.6	13.1	27	8.1
Oakridge	3.2	12.1	26	42.3
Fillmore	3.0	12.1	25	6.4
Stonegate	5.0	20.5	24	33.1
Sequoyah	3.2	13.1	24	19.5
Britton	3.0	12.6	24	37.9
Bodine	5.5	24.0	23	34.2
Western Village	2.8	12.3	23	65.6
Southern Hills	2.0	8.9	22	7.0
Lafayette	2.0	8.9	22	2.7
Van Buren	2.0	9.0	22	7.7
Willard	1.2	5.7	21	9.1
Parmelee	3.0	14.6	21	11.8
Wilson	2.0	9.5	21	26.4
Arcadia	1.0	5.1	20	28.5
Stand Watie	3.0	16.0	19	25.9
Lee	3.5	19.0	18	6.6
Hillcrest	2.0	11.4	18	11.6
Coolidge	3.0	17.0	18	5.1
West Nichols Hills	2.0	11.5	17	20.0
Eugene Field	4.0	23.3	17	31.8
Prairie Queen	3.0	17.5	17	6.2
Madison	1.0	6.0	17	15.0
Davis	1.2	7.2	17	9.9
Johnson	2.0	13.1	15	27.4
Arthur	2.0	13.6	15	7.3
Adams	2.0	14.8	14	6.1
Buchanan	1.0	10.1	10	8.8
Pierce	1.0	10.1	10	16.3
Linwood	1.0	10.1	10	13.6
Rancho Village	0	10.2	0	10.6
Total	237.9	820.4		

Fifth-grade centers omitted because of non-comparable grade structure of Hoover. Chart compiled from pl. ex. 54 with additional detail from pl. ex. 29.

tion of qualified faculty was a motivating concern for the choice provision. Rec. vol. IV at 546, 548. He acknowledged that this caused some racial imbalance and there was a desire to make sure that this assignment process was not repeated. *Id.* at 555.

The response of the school district to this situation is relevant to understanding the district court's finding of no segregative intent. This court states: "Although the executive director of personnel testified that especially after 1985, the teacher assignments would comply with the district affirmative action goal of 36.9% with a 10% variance factor [±10%], the numbers belie the aspiration." Court's Opinion at 39-40 (footnote omitted). The personnel director, Vern Moore, actually testified that there would be compliance in almost all of the elementary schools by August 1987. Rec. vol. IV at 557; *see also* def. ex. 199 (tracking status of compliance at schools as of June 1987). His testimony did not indicate that earlier balance was expected. The court's statement makes it appear that since 1985 the district has ignored the situation. Not so. Moreover, this court is of the view that specific evidence of a change is lacking. Court's Opinion at 40.

Mr. Moore testified that as of April 1987, building administrators were given direct responsibility for compliance with affirmative action goals and faculty racial balance. Rec. vol. IV at 553. Because several schools were closing, it was necessary to assign a veritable gondola of teachers; the board entered into an agreement with the teachers' union that provided that teacher preference would be honored so long as the district's personnel goals were met. *Id.* at 555. This was expected to be a big help in complying with the board's standard. *Id.* at 559.

Mr. Moore also prepared projections for the 1987-88 school year, indicating that many K-4 elementary schools would have the system-wide black faculty average of 36.9%, plus or minus (±) 10%. *Id.* at 556-59.

He also indicated that the racial composition of the administrators at the elementary schools with 90%+ black enrollment was 4 blacks out of 10 administrators in 1986-87, and 3 blacks out of 10 administrators in 1987-88. *Id.* at 552. As for those elementary schools with less than 10% black enrollment, the racial composition of the administrators was 1 black out of 13 administrators in 1986-87, and 4 blacks out of 12 administrators in 1987-88. *Id.* Linda Joyce Johnson, affirmative action program planner for the district, corroborated Mr. Moore's statements. Rec. vol. V at 809-10. Ms. Johnson testified that the board had adopted a recommendation which would bring the faculties into greater racial balance. *Id.* The district court credited her statements. *See Dowell*, 677 F. Supp. at 1519.

Plaintiffs' expert Dr. Foster testified that the neighborhood school plan resulted in a higher concentration of black faculty at schools with the highest percentages of black enrollments and a lower concentration at schools with the lowest percentage of black enrollment. Rec. vol. VIII at 1269-70. Dr. Foster's concern was that a school should not be considered racially identifiable based upon faculty assignment. *Id.* at 1270. On direct examination, Dr. Foster was asked to comment upon the faculty assignment exhibits relied upon by the plaintiffs and this court:

> Mr. Chachkin: Now, Dr. Foster, . . . in describing the last four of those exhibits that dealt with faculty, you talked about patterns of assignment.
>
> You've been here through the defendants' testimony concerning the new board policy in administrative procedure concerning faculty assignments and affirmative action goals at individual schools; is that correct?

> Dr. Foster: Yes.
>
> Mr. Chachkin: What's your opinion concerning the new policy and procedure in light of — how is that going to affect the patterns that you've noted in your own analysis?
>
> Dr. Foster: In my opinion, if these are followed in a fairly short time, they should be productive to the extent that all schools would . . . be in line.

Id. at 1275-76.

Dr. Foster thought that it might be difficult for the district to comply with its voluntary affirmative action goal of placing ±10% of the system-wide average (36.9%) of black faculty at every elementary school, but he had no problem with such a standard. Rec. vol. IX at 1387-88. The standard might be difficult to meet because the elementary system-wide average for black faculty is only about 30%. Rec. vol. VIII at 1276. He then stated:

> Dr. Foster: Other than that, I think if the personnel services as the board adopted the policy signs off on all transfers and employment and they won't approve them unless they're in line with the goals that are outlined in the policy, it should work out.
>
> It's not that far off as it is right at the moment, but there are trends and discrepancies that have been obvious the last couple of years.

Id. at 1276-77. Dr. Foster also agreed that the imbalance of the faculty was not due to an intent to discriminate by the board, rather "[t]hey simply slid a little bit

during that period, and, as I see it, the board is now getting them back into shape." Rec. vol. IX at 1389. Thus, the district court could rely upon the nondiscriminatory one-time reason for the faculty imbalance, together with the efforts of the district to attain racial balance in the elementary faculties, and conclude that the racial imbalance in the faculty which had existed was not indicative of segregative intent.

VIII.

This court's direction to the district court to take evidence concerning "alternatives to maintain racially balanced elementary schools," modify the Finger Plan, and then "retain jurisdiction for a reasonable period of time to oversee the implementation and maintenance of [the] assignments," Court's Opinion at 53, is nothing short of a call for another remedy of unlimited duration. The district court plainly recognized that residential separation results in neighborhood schools which are virtually one-race black schools. *Dowell*, 677 F. Supp. at 1521. Plaintiffs' expert Mr. Rabin[28] testified concerning the residential separation which still exists in Oklahoma City. But this residential separation was never linked to the school board:

Mr. Day: My question, Mr. Rabin, was with regard to the actions of the Oklahoma

[28] In discussing Mr. Rabin's testimony, the court refers to him as "Dr. Rabin," and indicates that the district court would have done well to "reference" his testimony. Court's Opinion at 28. Mr. Rabin was qualified as an expert on planning and land use and the analysis of population distribution and its change over time. Rec. vol. VII at 1119. He is qualified but, as was brought out on cross-examination, Mr. Rabin does not hold a doctorate degree or any other postgraduate degree. *Id.* at 1135-36.

Based on Mr. Rabin's testimony, this court takes issue with the district court's discussion concerning the relocation of the black population which has occurred in the district. Court's Opinion at 28-29; *Dowell*, 677 F. Supp. at 1507-08. Mr. Rabin testified concerning the characteristics of various census tracts which had more than 75% + black residents. He noted that the black population has increased 2.75 times between 1950 and 1980 and that spatially, "the area of black concentration has increased very substantially." Rec. vol. VII at 1129.

Year	Number of Census Tracts 75%+ Black	% of Black Population in Those Tracts	No. of Black Residents in Those Tracts
1950	1	24.9	5,236
1960	6	69.5	

Year	Number of Census Tracts 75%+ Black	% of Black Population in Those Tracts	No. of Black Residents in Those Tracts
1970	13	73.3	
1980	16	60.8	35,691

Id. at 1132-35. The 90% + black enrollment schools are located in the concentrated tracts. *Id.* at 1134-35.

Dr. Clark analyzed 7 tracts which were concentrated in 1960 over time. One justification for studying these tracts is that they have been predominantly black throughout the entire period beginning with the district court's decree in 1963, *Dowell v. School Bd.*, 219 F. Supp. 427 (1963). *See* rec. vol. VII at 1153-54. Dr. Clark determined that in 1960, 84% of all blacks in Oklahoma City resided in these tracts; by 1980, only 16.8% resided there. *Dowell*, 677 F. Supp. at 1507. In my view, Dr. Clark came to the permissible conclusion that there was "a fair amount of population change going on in the area." Rec. vol. II at 71. He readily pointed out that census data cannot tell us that the expansion of the black population throughout the school district was attributable to blacks moving out of these tracts, but he did make the reasonable inference that some of the black population expansion in the eastern western parts of the city and county was attributable to migration from the inner city area. *Id.* at 71-72. He also acknowledged the limitations of census data just as Mr. Rabin did, rec. vol. VII at 1156, 1159, and as this court attempts to do. *Id.* at 71; *see* Court's Opinion at 25 (declaring the long census *form* "suspect").

To get away from the limitations inherent in the census data, Dr. Clark compiled relocation maps which indicate residential change for those kindergarten students who resided in the attendance areas of the fifth-year centers in 1974-75. Def. ex. 7, *reproduced in* Appellee's Addendum to Brief. Three years later, by 1977-78, of those families who relocated, 209 moved out of the school district entirely, 148 relocated within the fifth-year attendance areas and 70 moved outside these predominantly black attendance areas. *Dowell*, 677 F. Supp. at 1507; *see also* Court's Opinion at 29 (finding that 46 of the 70 moved into "white areas."). Only one family moved to the elementary attendance area to which their child was being bused. *Dowell*, 677 F. Supp. at 1507. A similar analysis was done for families with K-2 children in 1982-83 who had relocated by 1984-85. Def. ex. 8, *reproduced in* Appellees' Addendum to Brief; *Dowell*, 677 F. Supp. at 1507-08. The district court concluded from the studies that compulsory busing does not influence black relocation patterns. *Dowell*, 677 F. Supp. at 1508.

This court criticizes the relocation studies because 1) many thousands of black families live in the area, and 2) "the more predominant population shift, 148 families, was within the northeast quadrant." Court's Opinion at 29. Actually, the most predominant population

City Board of Education. Are you aware of any action the board took, after this court entered its decree in 1963, which compelled black to live in those tracts or any of the other 16 which you've identified as predominantly black?

Mr. Rabin: I'm not. No. No.

Rec. vol. VII at 1154-55. It is inimical to due process to hold this school board responsible, under power of contempt, *Dowell*, 795 F.2d at 1523, for a current condition which it did not create and is not empowered to change — residential separation. *See Dowell*, 677 F. Supp. at 1521.

The reality is that the 1972 plan no longer met the educational objectives of this district in grades 1-4. Resurrecting the 1972 Finger Plan concerning assignment, which was substantially changed over the years due to demographic change and finally replaced in 1985, probably is a step backward. A generation of students has been schooled, facilities have changed, the population has moved and the racial composition of the system has been altered significantly. The district has not been afraid of innovation to improve the educational experience; the Adopt-A-School program, *Dowell*, 677 F. Supp. at 1517, the Student Interaction

shift was to areas *outside* the studied area — some 279 families out of 427 relocated outside the district (209) or outside the studied area (70). Of those who stayed in the district, only 34.6% (148/427) stayed within the studied area. As for the court's second objection, as a practical matter the nature of the study was small; it would be unreasonable to expect the school board to offer a study with information about every relocation in the district. Even Mr. Rabin conceded that the information established that some black children and families have left the northeast quadrant and moved out to other areas of the community — he had "no doubt that that took place." Rec. vol. VII at 1157.

The district court could rely upon the demographic data in the case to conclude that there had been movement from the northeast quadrant, that residential concentration of a portion of the black population is not a vestige of a dual school system and that the defendants cannot and are not charged with the duty of eliminating residential separation. *See Dowell*, 677 F. Supp. at 1512, 1521.

Plan, Court's Opinon at 42-43,[31] and the Equity Officer and Committee,[32] are evidence of that. These programs do not result in racial balance at every school, *see* Court's Opinion at 44, but they do contribute to the district's mission of providing high-quality educational opportunity in a unitary system.

This court does not really deal with the plaintiffs' integration plan which the district court found unworkable as proposed. *Dowell*, 677 F. Supp. at 1524-26. Stating that its "focus is upon the issue of desegregation," this court ignores the practicality of implementing its mandate, declaring such concern to be "shibolethic [sic] speculation." Court's Opinion at 21-22 n.19. Of course, we know that the 1972 Finger Plan required extensive transportation, as would the proposed Foster Plan. Under Dr. Foster's plan, which restructures some elementary schools into K1-2 and K3-4 schools and leaves others as K1-4, the busing burden would be borne equitably between white and black students. The district court found that the school district would experience "a substantial wave of white flight." *Dowell*, 677 F. Supp. at 1525. Indeed, one of the permissible motivations of the neighborhood plan was to avoid white flight and increase student retention. *See* rec. vol. IV at 537-38 (discussing lower non-black retention

[31] Counsel for the school board asked some awkward questions when cross-examining Dr. Crain concerning the value of interaction between black and white children outside of school. *See* Court's Opinion at 43 n.45. Let it not go unsaid that counsel quickly admitted his "poor choice of words." Rec. vol. VII at 1093.

[32] The neighborhood plan provided for an Equity Officer and Equity Committee to monitor the schools for equality. Court's Opinion at 43; pl. hearing ex. 1 at 4; rec. vol. VI at 831. Rev. Gary Bender, chairman of the committee, testified concerning minority representation on the committee and the desire of the committee to augment the Student Interaction Plan. Rec. vol. VI at 831, 842. He also testified that in addition to concern with facilities and textbooks, the committee had also looked into the quality of the teaching staffs. *Id.* at 831-33.

rates).[33] This court does not reject that finding, although it does cast doubt upon it, based upon a footnote in a law review article that referenced an *American Lawyer* report. *See* Court's Opinion at 51 n.56. Looking at the data in this case, however, Dr. Steller indicated that if the Foster Plan were adopted some students would have switched schools three times as of the fifth grade. Rec. vol. IX at 1485. Dr. Lane testified that dismantling the neighborhood plan would be disruptive because it destroys the anchor of the neighborhood school and redirects scarce resources: "Let me put it this way. This district has opted for learning; this district has opted, it seems to me, for education; and that's where it wants to put its resources." Rec. vol. VI at 898. With finite resources and energy, the school board necessarily will have to rearrange objectives given this court's decision. Rec. vol. VI at 944 (Dr. Walberg).

Linking the defendants' constitutional responsibilities to the logistics of a 17 year-old desegregation

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[33] For example, Maridyth McBee testified concerning student retention from the fourth to the fifth grades:

Mr. Day: Ms. McBee, as a research specialist with the Oklahoma City School District, do you see any special significance to the retention ratios . . . over time?

Ms. McBee: It's obvious to see that the number of black students who were fourth graders and then subsequently become fifth graders is very similar. There are almost the same number in fourth grade as fifth grade.
For the others, that was the case in '71. However, since '71 we have lost substantial percent of non-black students from the fourth to fifth grade until 1986 when the number — the percent retained is higher.

Rec. vol. IV at 537. Clearly, the threat of white flight cannot justify a return to a dual system, however, the board may consider improved student retention in the elementary grades and its consequences for the secondary grades in an effort to secure wider integration. *See Parent Ass'n of Andrew Jackson High School v. Ambach*, 598 F.2d 705, 719-20 (2d Cir. 1979); *Higgins*, 508 F.2d at 794. Here, the school board has retained transportation for racial balancing in all but the first four grades notwithstanding its effect on student retention.

plan requires a very static view of the world. It also confuses the original remedy with the violation. As the Fifth Circuit has said:

> [C]ontinuing limits imposed as a remedy after the wrong is righted effectively changes the constitutional measure of the wrong itself; it transposes the dictates of the remedy for the dictates of the constitution and, of course, they are not interchangeable. Stated another way, the constitutional violation is purposeful separation of races in public education. The mix that would have occurred but for the racism is a judicially created hypothetical. We have insisted upon matching that model of a unitary desegregated status as a remedy for the wrong. Refusing, after the match, to allow a school district to vary from that model unless it proves its "nonsegregative" purpose confuses wrong and remedy.

Overton, 834 F.2d at 1176-77. Here, the school district proved non-segregative purpose to the district court and still does not prevail. Absent a constitutional violation, the school district should not be monitored by a federal court in perpetuity. The original desegregation decree in this case should be lifted and the schools entrusted to local control as our federal Constitution envisions.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-61-9452-B

ROBERT L. DOWELL, ET AL.,
PLAINTIFFS,

VS.

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT DISTRICT NO. 89, ET AL.
Defendants.

[Filed Dec. 9, 1987]

Norman J. Chachkin and Theodore M. Shaw, NAACP Legal Defense Fund, New York, New York; John W. Walker of John W. Walker, P.C., Little Rock, Arkansas; and Lewis Barber, Jr., of Barber/Traviolia, Oklahoma City, Oklahoma, Attorneys for Plaintiffs.

Ronald L. Day and Laurie W. Jones of Fenton, Fenton, Smith, Reneau & Moon, Oklahoma City, Oklahoma, Attorneys for Defendants.

William S. Price, United States Attorney, Oklahoma City, Oklahoma; Wm. Bradford Reynolds, Assistant Attorney General, Roger Clegg, Deputy Assistant Attorney General, David K. Flynn and Mark L. Gross, Attorneys, Department of Justice, Washington, D.C., filed an amicus curiae brief for the United States.

MEMORANDUM OPINION

Before LUTHER BOHANON, United States District Judge.

No matter how complex the remedial plan invoked, it is irrational to assume that a school desegregation plan will be able to serve the needs of the community indefinitely. Oklahoma City, or any other

community served by a unitary school system, will not remain demographically stable, "for in a growing, mobile society, few will do so." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 31 (1971). Following a unitary declaration in 1977, the parties are now before the court for reasons directly related to the impact of such demographic change upon the delivery of a quality education to all students.

In 1972, the court ordered the Oklahoma City Board of Education to implement a desegregation decree commonly referred to as the Finger Plan. *Dowell v. Board of Education of Oklahoma City Public Schools*, 338 F.Supp. 1256 (W.D. Okla. 1972), *aff'd*, 465 F.2d 1012 (10th Cir. 1972), *cert. denied*, 409 U.S. 1041. (1972). This decree was designed not only to assist the Board in satisfying its affirmative desegregative obligation, but also to allow the school district to achieve the ultimate goal — unitary status. *Dowell*, 338 F.Supp. at 1272.

After the decree had been successfully implemented, the Board moved to close the case because it had "eliminated all vestiges of state-imposed racial discrimination" and converted the school district into a unitary system. On January 18, 1977, after proper notice and hearing, the court entered an Order finding that the Board had carried out the decree and had "slowly and painfully accomplished" the goal of establishing a "unitary system."

> Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court. The Court believes and trusts that never again will the Board become the instrument and defender of racial discrimination so corrosive of the human spirit and so plainly forbidden by the Constitution.

ACCORDINGLY, IT IS ORDERED:

1. The Biracial Committee established by the Court's Order of December 3, 1971, which has been an effective and valued agency of the Court in the implementation of the Plan, is hereby dissolved;

2. Jurisdiction in this case is terminated ipso facto subject only to final disposition of any case now pending on appeal.

The $203,333.32 award of attorney fees and costs was the only matter on appeal. This court believed then and continues to believe that the Order Terminating Case quoted above followed the teachings of *Swann*.

For eight years, the Board continued to utilize the techniques of pairing, clustering, and compulsory busing — the tenets of the Finger Plan — through the 1984-85 school year. However, the Board had perceived progressive inequities in the Finger Plan resulting from demographic change in the community. In response, the Board adopted for school year 1985-86 a student assignment plan for grades K-4 which eliminated compulsory busing and assigned students to the elementary school located in the neighborhood where they resided. Eleven of the sixty-four elementary schools had a black student population exceeding 90% due in part to areas of residential segregation in Oklahoma City. The Board instituted the plan believing, as did the court, that the Oklahoma City schools were no longer subject to federal court supervision under *Swann*.

In 1985, the plaintiffs sought to intervene and reopen this action, challenging the School Board's decision to alter the basic method of pupil assignment at the elementary grade level. Following an evidentiary hearing in April, 1985, the court found that its unitary declaration in 1977 was binding and that the school district remained unitary in 1985. Additionally, the court concluded that the neighborhood school

plan was constitutional since it was not adopted with the intent to discriminate on the basis of race. Thus, the court ruled that special circumstances did not exist which warranted reopening the case. *Dowell v. Board of Education of Oklahoma City Public Schools*, 606 F.Supp. 1548 (W.D. Okla. 1985).

The Court of Appeals concurred that the 1977 unitary finding was binding upon the parties. *Dowell v. Board of Education of Oklahoma City Public Schools*, 795 F.2d 1516, 1522 (10th Cir. 1986). However, the Court of Appeals ruled it is only when the order terminating the case also dissolves the desegregation decree that the School Board "regains total independence from the previous injunction." *Dowell*, 795 F.2d at 1521. Since this court had not expressly dissolved the 1972 decree, the Court of Appeals remanded the case "for further proceedings to determine whether the original mandatory order [would] be enforced or whether and to what extent it should be modified." *Dowell*, 795 F.2d at 1523. In these remand proceedings, the Court of Appeals placed the burden of proof on the School Board: "[t]he defendants, who essentially claim that the injunction should be amended to accomodate neighborhood elementary schools, must present evidence that changed conditions require modification or that the facts or law no longer require the enforcement of the [1972] Order." *Id.*

This court fully intended in 1977 to restore the School Board to total independence and relinquish to the Board all control over the school district. This court is now aware that it should have dissolved the injunction in 1977, as pointed out in the Circuit opinion, because the Oklahoma City schools were at that time, as they are today, operating as a unitary system, wholly without discrimination to blacks or other minority students, faculty or staff.

On February 5, 1987, this court granted the Petition for Intervention and Plaintiffs' Motion to Reopen,

and set the matter down for an evidentiary hearing on the merits. The hearing was conducted in June, 1987. Following eight days of testimony, careful review of all trial exhibits, and consideration of the arguments of counsel, the court is now entering its Memorandum Opinion containing its findings of fact and conclusions of law, and holding that the evidence of the defendants far outweighs the evidence of the plaintiffs.

I.

WHAT IS THE CAUSE OF CURRENT RESIDENTIAL SEGREGATION IN OKLAHOMA CITY?

The fundamental issue the court must address is whether the School Board has shown a substantial change in conditions warranting dissolution or modification of the 1972 Order. The existence of residential segregation in certain Oklahoma City neighborhoods has resulted in the existence of the predominantly black elementary schools which are being challenged by plaintiffs. Thus, the cause of the residential segregation which presently exists in Oklahoma City lies at the very heart of the issue the court must determine. A review of the nature of demographic change which took place in Oklahoma City following implementation of the Finger Plan sheds light on the answer.

A. Demographic Data

1. Past Governmental Barriers

By way of background, the state-compelled dual school system in Oklahoma City was rooted in state constitutional and statutory provisions mandating separation of the races for public educational purposes. Early ordinances in Oklahoma City set aside areas within which blacks and whites were to live. Past developers platted lands with restrictive covenants which prohibited the sale of homes to blacks. In 1963, this court recognized that the residential pattern of white and black people in Oklahoma City had been

set by law for a number of years. These early residential patterns had much to do with the segregation of the public schools in Oklahoma City. The east and southeast portions of the original city of Oklahoma City was black, and all other sections of the city were occupied by the white race. *Dowell v. Board of Education of Oklahoma City Public Schools,* 219 F.Supp. 427, 433-34 (W.D. Okla. 1963). Thus, the schools for blacks were centrally located in a predominantly black section of Oklahoma City, comprising generally the central east section of the city. Residential segregation was encouraged through a special transfer policy which was implemented by the Board of Education between 1955 and 1963. This "minority-to-majority" policy was stricken down by the court in 1963. *Dowell,* 219 F.Supp. at 442.

2. The East Inner-City Tracts

The nature and extent of demographic change following this state of affairs in Oklahoma City was illuminated by U.S. census data presented at the recent hearing. A census tract map of the Oklahoma City metropolitan area for 1960 clearly shows the historical concentration of black households in the east inner-city area. (Def. Ex. 2; Tr. 45). The east inner-city area lies within census tracts 13, 27, 28, 29, 30, 38 and 79. (Tr. 66). By 1970 there was a distinct and extensive spread of the black population from this area across school district boundaries to the eastern part of the metropolitan region. (Def. Ex. 3). However, there were few, if any, b'ack households in the northern, western and southern parts of the school district in 1970.

.. Relocation Statistics

Following implementation of the Finger Plan, the school district's research department conducted a study of relocation characteristics of the school district's black population. The survey focused on black families with kindergarten children residing in the east inner-city area as of 1974-75, who relocated by

1977-78. The results showed mobility: 148 families moved, but stayed within the east inner-city area; 209 families moved out of the east inner-city area, but did not relocate within the school district; and at least 70 families moved from the east inner-city area to predominantly white sections of the school district lying to the north, west and south. Only 1 of the 70 families moved within the attendance area of the elementary school to which their child was being bused for desegregation purposes. (Tr. 55-60)

The metropolitan census data for 1980 confirmed the trend revealed by the research department's study. There had been a substantial migration of blacks to the northern, western and southern parts of the school district. (Def. Ex. 4; Tr. 61). Also, the Millwood School District, to the east, became predominantly black. (Tr. 65).

Between 1960 and 1980 the east inner-city tracts remained predominantly black. Yet, as the following table reveals, there was a quite substantial decrease in the number of blacks choosing to live in this area:

	Black Population		
Tract No.	1960	1970	1980
13	4818	5463	4198
27	2696	1691	22
28	6784	4554	3504
29	3684	1183	447
30	5066	2746	853
38	3324	1625	912
79	2905	2747	2623

In 1960, 84% of all blacks residing in the Oklahoma City metropolitan area lived within these tracts. In 1980, however, only 16.8% of the total black population in the metropolitan area lived in this area. (Def. Ex. 5D; Tr. 67-68).

Also, between 1960 and 1980 there was a substantial amount of turnover in the black population residing in the east inner-city tracts.[1] For example, between 1965 and 1970 the average rate of turnover in the east inner-city area was 42%, and between 1975 and 1980 it was 33.2%. (Def. Ex. 5E). These statistics show a considerable amount of population change going on in the east inner-city area. Some blacks were choosing to live within the area and others were choosing to move away. (Tr. 71). The substantial drop in numbers in the east inner-city tracts between 1960 and 1980 accounts for much of the expansion of the black population throughout other parts of the metropolitan area.[2] (Tr. 71-72).

Since U.S. census data is only gathered every ten years, the latest available data was for 1980. However, the Oklahoma City School District maintained more current data. With this data, one of the Board's expert witnesses, Dr. William Clark, undertook a black population relocation study similar to the one conducted by the research department in the 1970's. This particular study focused on black families with kindergarten, first grade or second grade children who resided in the east inner-city area in 1982-83, and relocated by 1984-85. Of the families sampled, 324 moved out of the east inner-city area and did not relocate in the Oklahoma City school district. Three hundred five (305) families relocated within the east inner-city area. And, at least 180 black families moved to northern, western and southern parts of the school district. (Def. Ex. 8). Of these, only 2.1% moved into the attendance

[1] "Turnover" refers to persons who did not live in the same house five years previously.

[2] Between 1960 and 1980, there was a loss of approximately 43,000 whites from the main body of the school district in which the east inner-city area is located, but a gain of over 13,000 blacks. During the same period there was an increase of approximately 12,500 blacks outside school district boundaries in eastern Oklahoma County. Between 1960 and 1980, the white population in eastern, northern and western parts of the metropolitan area outside school district boundaries increased by 127,000. (Tr. 71-73).

area of the school to which their children were being bused for desegregation purposes. (Def. Ex. 9; Tr. 76). These relocation studies reveal the compulsory busing of black children to a certain area does not have any appreciable affect on where their parents choose to relocate. (Tr. 76-77).

For a different perspective, another expert witness, Dr. Finis Welch, analyzed the racial composition of the residential attendance zones in the Oklahoma City school district from 1972 to 1986. This analysis revealed that in 1972 there were 39 elementary school neighborhood attendance areas where virtually no black students (fewer than 1%) resided. By contrast, in 1986, blacks resided in every attendance area in the Oklahoma City school district. (Def. Ex. 11, 12, 13). Dr. Welch projected that the integration of Oklahoma City neighborhoods would continue to increase, and that by 1995 no attendance area in the district would have less than 16.2% black students residing there. (Def. Ex. 14).

4. Similarity Index and Exposure Index Research

Another means of analyzing the degree of segregation or integration in a defined area is through the use of dissimilarity and exposure indices.[3] The closer the dissimilarity index is to .00 the more integrated (or less dissimilar) the population. More segregation is shown as the index approaches 1.0. By contrast, the closer the exposure index is to .00, the more segregated (or less exposed) the population, and vice versa. (Tr. 128).

Between 1972 and 1986, the population residing within the Oklahoma City school district decentralized in such a fashion that the exposure of blacks to non-blacks almost doubled. In 1972, the overall expo-

[3] The dissimilarity index is a measure of how unevenly distributed the races are in a defined area. The exposure index is an alternative index showing how well integrated a defined area is. (Tr. 127-28).

sure index for the residential zones in the school district was .149; by 1986, the increased exposure of the races kicked the index up to .290 (Def. Ex. 40; Tr. 173).

Dr. Welch recently completed a study for the United States Commission on Civil Rights which analyzed, among other things, the degree of segregation in 125 school districts for a period spanning roughly 20 years. (*New Evidence on Desegregation*, Def. Ex. 27; Tr. 122-23). Of the 125 school districts studied, the Oklahoma City school district experienced the eighth largest reduction in the index of dissimilarity or, in other words, the eighth greatest improvement in integration, during the period from 1968 to 1982. (Def. Ex. 27; Tr. 130-31). In 1986, Oklahoma City ranked as the 39th largest metropolitan area in the country. Today, when the degree of dissimilarity in Oklahoma City, following implementation of the K-4 neighborhood school plan, is compared to the 24th through 56th largest metropolitan areas, the Oklahoma City school district falls in the mid-range. (Def. Ex. 38; Tr. 192). The least segregated is Columbus, Ohio, with a dissimilarity index of .136. The index for the Oklahoma City school district is .389. Birmingham, Alabama, is the most segregated with an index of .743. Even after implementing the K-4 neighborhood school plan, the degree of overall dissimilarity among the races attending school in Oklahoma City was less than that of Tulsa, Oklahoma, whose index was .557. (Def. Ex. 38).

Dr. Welch also compared the dissimilarity index in Oklahoma City following implementation of the K-4 neighborhood plan with that of other unitary school districts in the country. The comparison was made with school districts which had been declared unitary in cases involving the Justice Department. (Def. Ex. 39). Of the 47 unitary school districts analyzed, the Oklahoma City School District was the 27th most integrated (.389). At the extremes were the schools in Newton County, Georgia, which were the most integrated (.087), and those of Dekalb County, Alabama, the most segregated (.855). Regionally, Oklahoma City schools proved more integrated than those in Austin, Texas (.414) and those in Houston, Texas (.620). (Def. Ex. 39).

The degree of dissimilarity among the races attending schools in Oklahoma City is also of interest. In 1971, before the Finger Plan was implemented, the dissimilarity index district wide was rather segregative at .78. In 1984, the index revealed much more integration at .24, and following implementation of the K-4 neighborhood school plan, the index rose slightly to .38. (Def. Ex. 45; Tr. 187). The increased residential integration in Oklahoma City has resulted in a much lower level of dissimilarity today in the neighborhood elementary schools (.56) than existed in 1971 before the Finger Plan was implemented (.83). (Def. Ex. 44; Tr. 187).

5. Racial Composition of Schools Under the K-4 Plan

When viewing the demographic change which has occurred in Oklahoma City, it is helpful to keep in mind what has happened to the racial character of the student body. Between 1969 and 1986, the percentage of white students in the district dropped from 73% to 47%. The percentage of black students increased from 22.7% to 40%. And, the fraction of non-black minority students increased from 4% to 13%. (Def. Ex. 20; Tr. 153). Today, the student body is truly multi-cultural. The following table shows the racial composition of the K-4 neighborhood schools in Oklahoma City the first year the plan was effective. (Def. Ex. 63).

School	% Black	% Oriental	% Indian	% Spanish	% White	% Non-White
Lafayette	2.0	1.0	5.4	5.4	86.2	13.8
Shields Heights	4.0	0.3	7.4	21.4	66.9	33.1
Hillcrest	5.1	0.8	5.6	4.0	84.5	15.5
Arthur	5.7	1.8	8.6	4.1	79.8	20.2

School	% Black	% Oriental	% Indian	% Spanish	% White	% Non-White
Rancho Village	5.8	1.2	4.0	5.2	83.8	16.2
Prairie Queen	6.2	2.2	4.3	2.6	84.7	15.3
Parmelee	6.3	1.8	8.3	4.6	79.0	21.0
Davis	6.6	6.0	6.6	15.7	65.1	34.9
Willard	6.6	3.9	19.7	28.3	41.5	58.5
Coolidge	7.3	3.6	5.7	2.3	81.1	18.9
Buchanan	7.5	3.7	3.0	5.8	80.0	20.0
Lee	7.7	1.3	11.0	24.5	55.5	44.5
Southern Hills	8.0	5.1	1.1	6.8	79.0	21.0
Van Buren	8.4	0.9	11.9	3.1	75.7	24.3
Adams	8.5	0.0	4.5	7.0	80.0	20.0
Fillmore	8.7	1.5	3.3	5.7	80.8	19.2
Linwood	9.2	1.4	3.3	1.0	85.1	14.9
Wheeler	10.0	1.1	8.3	18.9	61.7	38.3
Madison	10.5	3.3	2.9	5.3	78.0	22.0
Hayes	10.7	0.0	4.9	3.4	81.0	19.0
Mark Twain	10.7	0.0	10.7	10.7	67.9	32.1
Heronville	11.0	0.7	8.2	15.4	64.7	35.3
Kaiser	11.9	2.3	0.5	4.0	81.3	18.7
Quail Creek	13.2	0.5	0.5	0.5	85.3	14.7
Columbus	14.9	1.3	9.5	23.5	50.8	49.2
Pierce	16.7	0.0	5.0	10.4	67.9	32.1
Sequoyah	16.7	1.2	4.4	4.4	73.3	26.7
Ridgeview	16.9	0.7	0.7	0.7	81.0	19.0
Hawthorne	17.2	8.1	9.7	12.9	52.1	47.9
Monroe	19.1	3.2	1.2	3.2	73.3	26.7
West Nichols Hills	21.7	1.5	2.2	1.1	73.5	26.5
Westwood	22.3	0.5	6.8	20.9	49.5	50.5
Stand Watie	24.8	1.8	7.7	15.0	50.7	49.3
Johnson	27.0	0.7	1.3	6.5	64.5	35.5
Gatewood	30.7	12.1	3.7	10.5	43.0	57.0
Horace Mann	30.7	4.3	2.7	3.2	59.1	40.9
Stonegate	31.0	2.3	0.6	1.6	64.5	35.5
Putnam Heights	31.1	9.8	4.0	5.1	50.0	50.0
Eugene Field	31.3	4.7	9.8	26.5	27.7	72.3
Wilson	31.3	11.2	4.6	6.6	46.3	53.7
Bodine	32.7	1.9	3.2	1.4	60.8	39.2
Arcadia	35.6	0.0	6.9	2.8	54.7	45.3
Shidler	35.9	0.0	5.9	28.9	29.3	70.7

School	% Black	% Oriental	% Indian	% Spanish	% White	% Non-White
Britton	36.5	1.7	1.7	1.7	58.4	41.6
Rockwood	39.0	0.7	6.6	11.1	42.6	57.4
Harrison	41.6	0.7	1.3	3.9	52.5	47.5
Oakridge	43.5	1.5	3.0	1.5	50.5	49.5
Willow Brook	46.3	1.2	1.2	2.7	48.6	51.4
Star	54.5	0.0	1.2	0.3	44.0	56.0
Telstar	55.8	1.7	3.3	2.1	37.1	62.9
Edgemere	56.3	19.3	2.7	6.0	15.7	84.3
Western Village	60.0	3.8	0.6	0.9	34.7	65.3
Spencer	71.6	0.6	1.4	0.6	25.8	74.2
North Highland	96.3	0.9	0.0	0.0	2.8	97.2
Dewey	96.6	0.4	0.0	0.0	3.0	97.0
Lincoln	97.2	1.0	0.6	0.0	1.2	98.8
Parker	97.3	0.0	0.9	0.5	1.3	98.7
Polk	98.4	0.4	0.0	0.0	1.2	98.8
Truman	98.7	0.0	0.0	0.0	1.3	98.7
Creston Hills	99.0	0.0	0.0	0.0	1.0	99.0
Garden Oaks	99.0	0.5	0.0	0.0	0.5	99.5
Edwards	99.5	0.0	0.0	0.0	0.5	99.5
Longfellow	99.6	0.0	0.4	0.0	0.0	100.0
King	99.7	0.0	0.3	0.0	0.0	100.0
District Elementary Students	36.0	2.3	4.2	6.8	50.7	49.3

It is notable that today the students attending K-4 elementary schools in Oklahoma City are 50.7% white and 49.3% non-white minority. While it is true that the new assignment plan resulted in some schools which are 90% or more black, the plan created *no* schools which are 90% or more white. In contrast, prior to the time the Finger Plan was implemented, there were a substantial number of 90% or more white schools in the district. Today, the vast majority of the elementary schools in Oklahoma City are truly racially mixed.

Many jurists and scholars have speculated about the forces which mold the racial composition of neighborhoods. Although these forces are often complex, the evidence here shows they are not unidentifiable. In the old system of state-compelled segregation, un-

lawful governmental barriers were in large part responsible for the residential segregation of the races. However, over time these barriers have been totally removed.

B. Removal of Past Governmental Barriers

In 1935, for example, the Oklahoma Supreme Court declared Oklahoma City Ordinance No. 4524, commonly known as the "Segregation Ordinance," void for being in conflict with the Fourteenth Amendment to the United States Constitution. *Allen v. Oklahoma City,* 52 P.2d 1054 (1936) (construing *Buchanan v. Worley,* 245 U.S. 60, 38 S.Ct. 16, 16 L.Ed. 149). In 1948, by virtue of the United States Supreme Court's decision in *Shelley v. Kraemer,* 334 U.S. 1 (1948), restrictive covenants were rendered unenforceable in the courts. *See also Correll v. Earley,* 205 Okl. 336, 237 P.2d 1017 (1951). In 1954, the Supreme Court's landmark decision in *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954) (*Brown I*), rendered Oklahoma's constitutional and statutory provisions mandating separation of the races for educational purposes unconstitutional, null and void, and unenforceable. *See Dowell,* 219 F.Supp. at 433.

As the old laws were set aside, new protective legislation took hold. In 1963, the Oklahoma Legislature established the Oklahoma Human Rights Commission and clothed that agency with authority to deal with racially motivated employment discrimination, 74 O.S. § 951, et seq. In 1965, the Oklahoma City Council passed an ordinance which prohibited discriminatory practices at any place of public accomodation. (Oklahoma City, OK, Ordinance 11018 (1965)). In 1968, the Oklahoma Legislature passed an Act to provide for execution within the state of the policies embodied in the Federal Civil Rights Act of 1964. 25 O.S. 1971 § 1101 et seq. In 1970, the Oklahoma City Council enacted fair housing ordinances prohibiting discrimination in housing by financial institutions, real estate brokers

or city employees. (Oklahoma City, OK, Code § 21-166.5 (1970)). In 1980, the Oklahoma City Human Rights Commission was created and given authority to cooperate with law enforcement agencies in rectifying any apparent violations of any ordinances pertaining to discrimination and related matters. (Oklahoma City, OK, Ordinance 15702 (1980)). And, the state legislature in 1985 enacted detailed statutes to deter housing discrimination. 25 O.S. § 1451-1453.

The foregoing decisions, statutes and ordinances reveal that not only have the unlawful and deplorable governmental barriers of the past been removed, but that laws have also been enacted to deter governmental discrimination in the future. The testimony of several black witnesses showed that today black people in Oklahoma City voluntarily choose where they wish to reside, unrestricted by the unlawful barriers of the past. (Tr. 313; Tr. 678).

C. Current Causes of Residential Segregation

Having determined that unlawful governmental barriers of the past have been finally laid to rest, the court views it appropriate to identify the forces presently at work which are molding the racial composition of the neighborhoods in Oklahoma City. In 1985, the United States Commission on Civil Rights called for a study on the causes of residential segregation in America. Dr. William Clark, one of the Board's experts, was commissioned to conduct the study and present findings to the Commission. After presenting his findings to the United States Commission on Civil Rights, Dr. Clark published the substance of his study. *Residential Segregation in American Cities: A Review and Interpretation,* Population Research and Policy Review 5:95-127 (1986); (Def. Ex. 10; Tr. 82). Dr. Clark's study showed that today the factors which influence

residential segregation are: (1) economics and housing affordability; (2) personal preferences and social relationships; (3) urban structure; and (4) private discrimination. (Def. Ex. 10; Tr. 84).[4]

Empirical evidence suggests that between 30-70% of racial separation in America today is attributable to economic status. (Def. Ex. 10, p. 1). The gains in black income generally made in the 1960's and 1970's is being expressed in the spatial pattern of black households today. (Tr. 86). With respect to personal preferences, the research shows that black households prefer neighborhoods which are 50% black and 50% white, while white families prefer neighborhoods ranging from 0-30% black. (Def. Ex. 10, p. 1; Tr. 85). Once a neighborhood becomes 25-30% black, research reveals that, due to personal preferences, white households start leaving the neighborhood. However, the neighborhood changes as much because white households prefer not to move into these areas. (Tr. 105). There are very, very small proportions of white households which move into neighborhoods that are predominantly black. (Tr. 105). The current preferences of blacks and whites are not unlike those of other ethnic groups. Vietnamese, Koreans, Japanese and Hispanics each have a high level of preference for people of their own race. (Tr. 111).

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[4] In addition to the reasons given by the expert witnesses in this case, it is not surprising that many blacks have chosen to remain in the northeast quadrant. The vast majority of the recreational facilities and cultural sites which make Oklahoma City such a desirable place to live are located in the northeast quadrant: the Cowboy Hall of Fame and Western Heritage Center, the Harn Homestead and 1889'er Museum, State Museum of Oklahoma, and the soon-to-be-completed, multi-million dollar Remington Park horse racing track. The Lincoln Park complex located on recently re-named "Martin Luther King Avenue" in the northeast quadrant, contains the nationally-renowned Oklahoma City Zoo, the finest municipal golf course, the Kirkpatrick Center Museum Complex and Omniplex, the National Softball Hall of Fame and Sports Complex, the Oklahoma Firefighters' Museum, and the 45th Infantry Division Museum. The City's nationally recognized Northeast High School is located in this quadrant, as is the State Capitol. Additionally, the premier medical research facility, Oklahoma Teaching Hospitals, and the V.A. Medical Center are found in the northeast sector. There can be no argument that the City of Oklahoma City has slighted this sector of the community.

Urban structure involves the relationships of cities and suburbs, the patterns of transportation, and the behaviors of individuals. A large number of studies show that households tend to move nearby. This element of the urban structure explains why we see patterns of growth spreading from previously concentrated areas. (Tr. 87-88). Today, private discrimination, such as racial "steering" by realtors, is one factor which contributes to the racial composition of neighborhoods. Yet, it is a much smaller factor than it was 30 years ago. (Tr. 85). Surveys of black households in Kansas City and Little Rock revealed that the vast majority of black families did not view themselves as having been the subject of private housing discrimination. (Def. Ex. 10, p. 119). This does not mean that there have been no acts of private housing discrimination. However, if most real estate transactions were guided by discriminatory intent, it would appear logical that people would report it in their experience more often than they do.

The causes which impact contemporary residential segregation explain why the east inner-city area in Oklahoma City remains predominantly black today. With the removal of the governmental barriers of the past and motivations of housing affordability and personal preferences, a vast number of blacks left the east inner-city area and integrated Oklahoma City's predominantly white neighborhoods. As a result of personal preference, very few white families moved into the east inner-city area. The exodus of a large number of blacks and the lack of white movement into the area has left the east inner-city area much less populated, but still predominantly black.

D. Summary

From the time of this court's original decision in this case over 25 years ago, the Oklahoma City Board of Education has taken absolutely no action which has caused or contributed to the patterns of the residen-

tial segregation which presently exist in areas of Oklahoma City. If anything, the actions of the Board of Education, through implementation of the Finger Plan at all grade levels for more than a decade, have fostered the neighborhood integration which has occurred in Oklahoma City. The Board's use of busing in grades 5-12 cannot help but promote neighborhood integration and deter residential segregation in the future. No court is equipped with the judicial power or machinery necessary to eradicate residential segregation. This phenomenon develops even in the midst of court ordered desegregation. For example, when the Finger Plan was implemented in 1972, the North Highlands attendance area in northern Oklahoma City was not predominantly black. Yet, despite more than a decade of compulsory desegregation, black families voluntarily chose to move into the North Highlands neighborhood. As a result, North Highlands today is predominantly (90% or more) black. Neither this court nor the Oklahoma City Board of Education can govern and control where people choose to live. All expert witnesses agreed there is virtually nothing a court or a board of education can do to eliminate residential segregation in Oklahoma City or elsewhere. In fact, the evidence showed that no desegregation decree has had the effect of eliminating residential segregation anywhere in America.

As the United States Supreme Court observed in *Swann*, 402 U.S. at 31, few communities served by school districts with newly acquired unitary status will remain demographically stable. Oklahoma City is no exception. The Supreme Court has also recognized "at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of de jure segregation warranting judicial intervention." *Keyes v. School District No. 1*, 413 U.S. 189, 211 (1973). That time has arrived in Oklahoma City. While the history of discrimination in Oklahoma City

cannot be ignored, it "cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980).

II.

WHY WAS THE K-4 STUDENT ASSIGNMENT PLAN ADOPTED?

The Board of Education asserts that over time the substantial demographic changes in Oklahoma City rendered the Finger Plan inequitable and oppressive. The resulting inequity, the Board contends, was the primary factor motivating its adoption of the new student assignment plan at the elementary level. The court will now turn its attention to the validity of the K-4 plan.

A. Review of the Finger Plan

An understanding of the tenets of the Finger Plan is essential to understanding the asserted resulting inequity. The Finger Plan restructured high school and middle school attendance zones so that each school enrolled both black and white students. A feeder system was used so that students were assigned to a high school or middle school based on the elementary attendance zone in which their home was located. *See generally Dowell*, 338 F.Supp. 1256.

At the elementary level, the majority black schools located in the east inner-city area were converted to fifth-year centers, while all other schools served grades 1-4. White students attended their neighborhood school for grades 1-4, and were bused to the former black schools for the fifth grade. Black students were bused to the majority white schools for grades 1-4, and attended their neighborhood school in the fifth grade. *Id.* at 1268.

If racial balance existed in an elementary neighborhood zone, or was subsequently achieved through demographic change, the elementary school in that zone qualified as a K-5 "stand-alone" school. When the Board recognized "stand-alone" status had been achieved, the fifth grade was returned to the neighborhood elementary school, and children were no longer bused into or out of that neighborhood zone to achieve racial balance. *Id.*

B. Creation and Adoption of the K-4 Plan

Between 1982 and 1984, studies conducted by the school district's research department revealed that certain inequities directly linked to the K-5 "stand-alone" concept were starting to surface. (Def. Ex. 69 - 75). When the Board recognized Bodine Elementary School in southeast Oklahoma City as a K-5 "stand-alone" school in 1984, the perceived inequities surfaced once again. As a result, in July of 1984, the Board of Education appointed a committee to study the "stand-alone" school concept and to report back with positive recommendations. The committee was comprised of three School Board members. Dr. Clyde Muse, a black minister with a Ph.D. in education, chaired the committee. The other committee members, Mrs. Susan Hermes and Mrs. Betty Hill, each had prior experience as certified school teachers. The committee met on an almost daily basis at the school district's research department for the purpose of fulfilling its charge. Needed data and statistics were provided to the committee by the district's sophisticated research staff. While the committee was meeting, Dr. Muse traveled to the Office of Civil Rights in Dallas, Texas, for consultation and advice. (Tr. 428).

1. Increased Busing Burdens on Young Black Pupils

In November, 1984, the committee presented its report to the Board of Education. The committee study revealed that after the Finger Plan was implemented

in 1972, demographic changes slowly took place which integrated more and more neighborhoods, particularly those in central Oklahoma City. In 1985, as a result of these demographic changes, there were approximately 13 elementary schools in neighborhoods with racial balance which qualified for K-5 "stand-alone" status. (Tr. 427). The study revealed that if K-5 "stand-alone" status was granted to the ever increasing number of elementary schools which qualified, then the young black students, previously bused into those schools from the east inner-city area, would have to be reassigned and bused to more distant schools. (Tr. 425). Since most of the racially balanced neighborhoods were centrally located in Oklahoma City, the reassignment of young blacks, the committee explained, would have to be to schools located further north, west or south. The obvious result would be to increase the busing burden, in terms of time and distance, on young black children in grades 1-4. (Tr. 425).

2. Closing of Fifth-year Centers in the Northeast Quadrant

In addition, the committee pointed out that when a "stand-alone" school reacquired its fifth grade, this caused the student population at the fifth-year centers located in the east inner-city area to drop. (Tr. 426). Under school district guidelines, if enrollment dropped below a certain level in a given school, the school was subject to closing. The ultimate effect would be to leave a predominantly black part of the community without public schools. All fifth-year centers had enrichment programs which included intramurals, string instruments, special interest sessions and "Opening Doors" programs. The committee found it would be increasingly difficult to make these special fifth-year center programs equally available across the district to all of the potential K-5 "stand-alone" schools. (Def. Ex. 95).

C. Experts Acknowledge "Stand-Alone" Inequities Existed

It is significant to the court that plaintiffs agree with the defendant Board that the Finger Plan ultimately proved inequitable. Dr. Finger testified that compulsory desegregation plans are not designed to last forever and that changes in plans become necessary as a result of demographic forces. (Tr. 1192) He acknowledged the increased busing burden on young blacks and the potential for the loss of fifth-year centers as a result of the "stand-alone" feature in the plan. (Tr. 1202). In fact, Dr. Finger expressed surprise that the plan had not already been modified as a result of demographic change. (Tr. 1198-99).

Another expert for plaintiffs, Dr. Gordon Foster, also agreed that the inequities resulting from the "stand-alone" feature justified modification of the plan. (Tr. 1266-67). Counsel for plaintiffs assert that the method of pupil assignment under the Finger Plan was not fully equitable and that these inequities were exacerbated by the "stand-alone" school concept. In the Pretrial Order, "Plaintiffs' Contentions" (Appendix "A", p. 3), counsel for the plaintiffs states:

> The "stand-alone school" feature of the original Finger Plan, over time, increased the burdens borne disproportionally by Black children. As new areas of the district qualified for "stand-alone" status the distances which Black students in grades 1-4 would have to be transported increased and the likelihood that schools in black residential areas would be closed increased.

In plaintiffs' Trial Brief (p. 14) counsel states:

> One of the principal bases advanced in 1985 for the system's adoption of a new assignment plan in grades 1-4 was the inequitable burdens being borne by Black students residing in

> northeastern Oklahoma City. These concerns are legitimate ones which are shared by plaintiffs.

Expert witnesses for the defense also confirmed inequity flowing from the "stand-alone" school concept. Dr. Finis Welch stated that in his opinion the Finger Plan was designed for a district that is 20% black. According to Dr. Welch, in light of the overall demographic change in the community, the plan could not last and was destined to fail. As Dr. Welch explained, demographic change directly affected the "stand-alone" school feature so as to "whiplash" the remainder of the district with increased busing burdens. (Tr. 219-21). Dr. Welch pointed out that if the "stand-alone" feature was followed year-by-year into the future, the inequity flowing from the "stand-alone" concept would continue to increase. (Tr. 222-25).

D. Summary

This court agrees with the parties and concludes without question that, over time, demographic change in Oklahoma City has rendered the "stand-alone" school feature in the Finger Plan inequitable and oppressive. In so ruling, the court is mindful of *Swann's* admonition that "[a]n objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." 402 U.S. at 30.

Since all parties agree and the court concurs, that tenets of the Finger Plan proved inequitable and oppressive by virtue of demographic change, the remaining question becomes whether the inequity warrants dissolution or modification, and if so, to what extent. However, before reaching any conclusions with respect to dissolution or modification, the court deems it imperative to determine if the Oklahoma City School District has maintained its unitary status since 1977.

III.

HAS THE SCHOOL SYSTEM RETAINED ITS UNITARY STATUS?

Six separate components of a school system must be non-discriminatory before total unitary status can exist: (1) faculty; (2) staff; (3) transportation; (4) extra-curriculur activities; (5) facilities; and (6) the composition of the student body. *Green v. County School Board of New Kent County,* 391 U.S. 430, 435 (1968). At the time this court totally relinquished jurisdiction in 1977, the court was convinced that the Finger Plan had been carried out in a constitutionally permissible fashion and that the school district had reached the goal of becoming a desegregated, non-racially operated, and unitary school system. The Tenth Circuit Court of Appeals recognized that this non-appealed unitary finding is binding upon the plaintiffs. *Dowell,* 795 F.2d at 1522.

A. K-4 Plan Was Adopted Without Discriminatory Intent

A once unitary school district may lose its unitary status by partaking in intentionally discriminatory acts creating de jure segregation. The potential for such regression is recognized in the *Swann* decision which, however, warned that a district court's intervention subsequent to the achievement of unitary status is not anticipated "absen[t] . . a showing that . . . school authorities . . . ha[ve] deliberately attempted . . . to affect the racial composition of [its] schools." *Swann,* 402 U.S. 1, at 32. In its *Keyes* decision, the Supreme Court reaffirmed this aspect of *Swann* and recognized that "at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of de jure segregation warranting judicial intervention. *Keyes,* 413 U.S. at 211.

The *Swann* and *Keyes* decisions, therefore, stand for the proposition that subsequent to the achievement of unitary status, the de facto/de jure distinction mandates a search for discriminatory intent before governmental action may be declared unconstitutional. The relevancy of intent under these circumstances was again emphasized by the Supreme Court in its *Dayton I* decision:

> The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the School Board which [was] *intended* to, and did in fact, discriminate against minority pupils, teachers, or staff. (Emphasis added).

Dayton Board of Education v. Brinkmann, 433 U.S. 406, 420 (1977) (*Dayton I*).

Although the Court of Appeals held that the plaintiffs herein do not have the burden of proving discriminatory intent, the court did not rule that the question of intent was irrelevant. To the contrary, the court examined this court's findings in 1985 with respect to discriminatory intent to determine if reversal would be futile. The Court of Appeals concluded that the plaintiffs were not prepared to address this substantive question and remanded the case for further factual determinations. *Dowell,* 795 F.2d at 1523. Even though the Oklahoma City School District had earlier achieved unitary status, the Court of Appeals directed that on remand the defendant Board of Education would carry the burden of proof since the original decree had never been dissolved.

At trial, the Oklahoma City Board of Education carried the burden of proof; this court concludes that the Board proved by a preponderance of the evidence that its new student assignment plan was adopted without the intent to discriminate on the basis of race.

As the court noted earlier, adoption of the new plan was primarily motivated for the legitimate and non-discriminatory purpose of avoiding the oppressive realities demographic change cast upon the "stand-alone" school concept.[5]

B. K-4 Plan Was Adopted For Legitimate, Non-Discriminatory Reasons

1. Parental Involvement

However, the evidence disclosed there were additional non-discriminatory reasons why the Oklahoma City Board opted for neighborhood schools at grades K-4. One such reason was to increase the degree of parental involvement in the schools. As Professor James Coleman writes, "government policies must, to be effective, anticipate parental decisions and obtain the parents' active cooperation." Coleman, *New Incentives for Desegregation*, 7 Human Rights 10, 13 (1978). In 1969, there were 95 parent-teacher associations (PTA's) in the Oklahoma City School District with a total membership of 26,528. (Def. Ex. 140, p.2). At the time the Board adopted the new plan in 1985, the number of PTA units had decreased to 15 and the total membership had dropped to 1,377. (Def. Ex. 140, p. 2). When the Board adopted its new plan it was convinced, and virtually every expert in this case agrees, that *parental involvement is essential to student academic achievement and a quality education.* (Tr. 515,

[5] The Supreme Court addressed the burden of proof issue, at least with respect to dual systems, in two cases. In *Swann* the Court ruled that "[w]here the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory." 402 U.S. at 26. And, in *Keyes*, the Court explained that "where a meaningful portion of the system is found to be intentionally segregated, the existence of subsequent . . . segregated schooling within the same system justifies a rule imposing on the school authorities the burden of proving that this segregated schooling is not also the result of intentionally segregative acts." 413 U.S. at 210. It appears the Tenth Circuit places the same burden on a unitary district where the original desegregation decree has never been dissolved.

736, 849, 891, 916, 1066-68, 1455). The evidence shows that the Board previously took steps in an effort to increase the level of parental involvement. For example, an attempt was made to implement a district-wide parents' council. School Board meetings were moved out into the community. Buses were sent to certain schools to pick up parents for meetings. However, all of these efforts failed. (Tr. 515-16, 594).

The Board believed that neighborhood elementary schools would increase parental involvement, and they were correct. After the plan was in operation for just one year, the number of PTA organizations increased by 100% and PTA membership increased by 80%. Following the second year of implementation, the number of PTA organizations had increased a total of 200% and PTA membership had increased by a total of 144%. (Def. Ex. 139-40). Following the implementation of the plan, the number of elementary parents attending open house and parent/teacher conferences substantially increased as well. Open house attendance was up 5,167 and 3,745 more parents attended parent/teacher conferences in 1986-87 than in the year preceding the plan. (Def. Ex. 140, 144-46).

2. Community Involvement

An increase in the level of community involvement with the public schools was also noted following implementation of the plan. The school system has an Adopt-A-School program under which local businesses and organizations donate time, goods, or services to particular schools in the district. The second year the plan was in operation there were 349 adopting organizations, making a total of 522 adoptions. By contrast, the year before the plan there were 53 adopting organizations, making a total of 111 adoptions. (Def. Ex. 142-43). A substantial amount of expert testimony was presented at trial which directly related these increases in parental and community involve-

ment to the adoption of the K-4 neighborhood plan. (Tr. 349-50, 428-29, 518-20, 584-85, 630, 736-37, 775, 853-54, 868, 897, 919).

C. K-4 Plan's Adoption Does Not Disturb the Components of the Unitary School System

1. Racial Imbalance Alone Does Not Mandate A Non-Unitary Finding

In reaching the conclusion that the Board did not adopt its new plan with discriminatory intent, the court sharply focused on the racial composition of the predominately black schools which came into being as a result of the neighborhood plan. Plaintiffs point out that many of the schools which were predominately black before the Finger Plan was implemented are predominately black today as a result of the neighborhood plan. Plaintiffs make much of the point that when the Board adopted the new plan, they incorporated the same neighborhood attendance zones that were used prior to the time the Finger Plan was implemented. However, this argument cuts both ways. The fact that the Board never gerrymandered the geographic composition of its neighborhood attendance zones also demonstrates that the Board in no way resisted the expansive migration of blacks into predominately white neighborhoods. The court also views it as significant that one of Plaintiffs' experts who had thoroughly investigated the case, Dr. Mary Lee Taylor, testified on cross-examination that in her opinion the Board did not adopt the plan with discriminatory intent. (Tr. 1238).

In sum, the only evidence which could support the notion that the Board adopted the plan with discriminatory intent is the fact that the plan did have a disproportionate impact upon some blacks in the district. However, the Supreme Court has reiterated that *discriminatory intent may not be inferred solely from the disproportionate impact of a particular measure*

upon one race. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977). *See also, Dayton Board of Education v. Brinkman*, 443 U.S. 526, 536 n.9 (1979) (*Dayton II*) ("The foreseeability of segregative consequences" is insufficient to make out a prima facie case of purposeful racial discrimination.).

Furthermore, the United States Supreme Court "has consistently held that the Constitution is not violated by racial imbalance in the schools, without more." *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977) (*Milliken II*). *See generally Dayton II*, 443 U.S. at 531 n.5 (Mere "racial imbalance . . . is not per se a constitutional violation."); *Washington v. Davis*, 426 U.S. 229, 240 (1976) (The existence of both "predominately black and predominately white schools in a community is not alone violative of the Equal Protection Clause."); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 434 (1976) (An order contemplating the "substantive constitutional right [to a] particular degree of racial balance or mixing" is infirm as a matter of law.); *Swann*, 402 U.S. at 26 (The existence of some one-race schools within a district "is not in and of itself the mark of a system that still practices segregation by law".). Therefore, "a neighborhood school policy in itself does not offend the Fourteenth Amendment." *Crawford v. Los Angeles Board of Education*, 458 U.S. 527, 537 n.15 (1982). It follows that a school board serving a unitary school system is free to adopt a neighborhood school plan so long as it does not act with discriminatory intent.

The search for unitariness, however, involves more than an analysis of the composition of the student body. In 1973, the Supreme Court emphasized that "[i]n addition to the racial and ethnic composition of a school's student body, other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school, must be taken into consideration" in determin-

ing whether or not a system is governed by de jure segregation. *Keyes*, 413 U.S. at 196. A review of these additional factors, therefore, is appropriate with respect to Oklahoma City.

2. *Integrated Faculty And Staff Assignments Support A Unitary Finding*

In 1963, the predominately black elementary schools in Oklahoma City employed all black principals and all black teachers. *Dowell*, 219 F.Supp. at 445-46. In contrast, today the principals and teachers at all schools, including the predominately black K-4 elementary schools, are both black and white. (Def. Ex. 187, 201). Thus, young black students continue to have contact with and the opportunity to learn from white teachers, and conversely, white students continue to have similar opportunities to meet, know and learn from black teachers. Interaction of this nature is desirable, and does not occur in truly segregated schools. *Columbus Board of Education v. Penick*, 443 U.S. 449, 467 (1979).

Although the faculties serving the elementary schools in Oklahoma City have remained integrated since the 1972 decree was implemented, they have not remained in perfect racial balance. Yet, to this day, the Board of Education continues to strive for balance through the implementation of its Affirmative Action Plan. (Def. Ex. 188; Tr. 802-03). Plaintiffs assert that vestiges of segregation remain in Oklahoma City since some of the schools with a higher concentration of black students have more black teachers than other elementary schools. The court finds this contention without merit. The Constitution does not freeze the black-white faculty ratio as of the date of the initial faculty desegregation. Once successful desegregation has occurred and a school system has achieved unitary status, "the system-wide racial ratio may thereafter change from time to time as a result of non-discriminatory" action. *Carter v. West Feliciana Parish School*

Board, 432 F.2d 875, 878-79 (5th Cir. 1970). *Accord Lee v. Walker County School System*, 594 F.2d 156, 159 (5th Cir. 1979). Indeed, "after faculty desegregation has been effectuated by remedial orders based on racial ratios," a school board is not obligated to make personnel decisions on the basis of such ratios. *Lee v. Russell County Board of Education*, 563 F.2d 1159, 1163 (5th Cir. 1977).

The evidence in this case showed that when the 1985 student assignment plan was implemented, the Board of Education entered into negotiations with the teachers' union to address the question of teacher assignments. Under the negotiated agreement, the teachers with seniority had more discretion in selecting their teaching assignment. (Tr. 548-49). Teacher and administrator preferences, to a large extent, determined faculty assignments following implementation of the plan. (Tr. 549). Where teachers lived, no doubt, influenced their preferences about where they wished to work. The court therefore concludes that teacher assignments in the school district were not motivated by discriminatory purposes. Moreover, the evidence showed that last year the Oklahoma City Board took action pursuant to its Affirmative Action Plan which will have the effect of bringing elementary faculties into racial balance in 1987-88. (Tr. 809)

3. *Attitudes Of Community And Administration Support A Unitary Finding*

As noted above, the attitudes of members of the community and the school administration are relevant in determining whether or not a school system is governed by de jure segregation. At the hearing, a substantial number of black school administrators and black patrons unequivocally testified that in their opinion the Board's K-4 neighborhood school plan was not discriminatory and did not result in the recreation of a dual school system. (Tr. 338, 431, 566, 576, 679, 798, 815).

4. Equitable Facilities And Expenditures Support A Unitary Finding

The uncontroverted evidence in this case showed that the school facilities under the neighborhood plan are not discriminatory. (Tr. 788, 832, 885, 893-94). Since most of the predominately black schools today served as fifth-year centers under the Finger Plan, they are actually in much better condition today than, for example, many elementary schools in southeast Oklahoma City. (Tr. 356). Of particular interest is the fact that expenditures made by the Board for the students in the predominately black elementary schools is greater than that made in the elementary schools with a black population of less than 10%. (Def. Ex. 126).

5. Additional Factors Support A Unitary Finding

Plaintiffs did not dispute that the present curriculum and extra-curricular activities in the school district are non-discriminatory. A mass of documentary evidence was admitted showing beyond question that the Board is not discriminating in these areas. (Def. Ex. 111-24). Additionally, the court views it as significant that the Board has elected to employ intelligent and competent black individuals in upper-echelon central office administrative positions. (Tr. 542-43). The diversity among the faculty and staff was graphically demonstrated by the employees testifying during the trial:

Black

Belinda Biscoe
Admins. for the
Department of
Support Programs
(Tr. 295)

Vern Moore
Executive Director of
Personnel Services
(Tr. 540)

White

Maridyth Montgomery
McBee
Senior Research
Associate (Tr. 534)

Dr. Carolyn Sue Hughes
Assistant Superintendent
for Curriculum and
Program Development
(Tr. 682)

Betty G. Hopkins Mason
Assistant Superintendent
for Instruction and
Related Services
(Tr. 571)

Dr. Arthur Wayne Steller
Superintendent of Okla.
City Public Schools
(Tr. 697)

Odette M. Scovey
Teacher/Principal for
27 years
(Tr. 785)

Linda Joyce Johnson
Affirmative Action
Program Planner
(Tr. 798)

No doubt, their presence will serve to deter racially discriminatory actions or any attempt to return to the dual system.

D. Summary

Taken together, the foregoing factors lead the court to conclude that the Oklahoma City School District has remained unitary from 1977 to the present.

IV.

SHOULD THE 1972 DECREE BE ENFORCED, MODIFIED OR DISSOLVED?

A. The Legal Test To Be Employed

With an understanding of the conditions presently existing in Oklahoma City, the court now shifts its attention to the fundamental issue on remand: Should the 1972 desegregation decree be enforced, modified or dissolved? The Court of Appeals has articulated guidelines which govern the dissolution or changing of mandatory decrees. *Securities and Exchange Commission v. Jan-dal Oil & Gas, Inc.*, 433 F.2d 304, 305 (10th Cir. 1970) (An injunction may be dissolved or modified where the underlying facts have so changed that the

dangers prevented by the injunction have "become attenuated to a shadow."); *Securities and Exchange Commission v. Thermodynamics, Inc.*, 464 F.2d 457, 460 (10th Cir. 1972) (In vacation proceedings, an injunction may be dissolved where there is a showing of "some substantial change in law or facts."); *E.E.O.C. v. Safeway Stores, Inc.*, 611 F.2d 795, 800 (10th Cir. 1979) (A decree may be vacated or modified where it is shown that changed conditions have produced "hardship so extreme and unexpected" as to make the decree oppressive.). The decisions of the Court of Appeals establishing these guidelines all point to one primary source of authority – the Supreme Court's decision in *United States v. Swift & Co.*, 286 U.S. 106 (1932). Therefore, an understanding of the context within which the *Swift* case was decided is essential. This was succinctly explained by the Supreme Court when it subsequently handed down its decision in *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968). *Swift* emphasized the power of a court of equity "to modify an injunction in adaptation to changed conditions though it was entered by consent." 286 U.S. at 114. The question in *Swift* was "whether enough had been shown to justify modification. *Id.* at 115. *United Shoe* points out that the danger of monopoly which led to the initial decree in *Swift* had not been removed. Thus, although in some respects the *Swift* decree had been effectuated, there was still a danger of unlawful restraints on trade which justified perpetuation of the decree. *United Shoe*, 391 U.S. at 248.

In *United Shoe*, the Supreme Court clarified the meaning of its prior decision and cautioned that its earlier statement in *Swift* – "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change [the decree]" – must be read in the context of the continuing danger of unlawful restraints on trade which the Court found still existed. *Id.* In conclusion, the Court in *United*

Shoe held, "*Swift* teaches that a decree may be changed upon an appropriate showing, and it holds that it may *not* be changed . . . if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." *Id.* Thus, in the process of determining whether dissolution or modification is warranted, it is essential for the court to determine whether the "purposes of the litigation," as incorporated in the 1972 desegregation decree, have been fully achieved.

1. The Purposes Of The 1972 Injunction Have Been Fully Achieved

In *Swann*, the Supreme Court identified the "purpose" of a desegregation case:

> Our objective in dealing with the issues presented in these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.

402 U.S. at 23.

Since there is no substantive constitutional right to "any particular degree of racial balance or mixing . . . [t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Id.* at 24. It is, therefore, clear that the purpose of a desegregation case is not to maintain racial balance in the public schools. Rather, the repeated mandate in each of the Supreme Court's decisions from *Brown I* to *Swann* is "the elimination of the discrimination inherent in the dual school systems." *Id.* at 22. Thus, the "target" of a desegregation case is the "dual school system," and the remedy commanded is to dismantle the dual

school system. *Id.* The Oklahoma City School District dismantled the dual system and met this objective in 1977, when it was declared unitary. Accordingly, perpetuation of the 1972 decree no longer serves the objective of this case.

The purpose of a desegregation remedy is to "correct" the condition that offends the Constitution. *Id.* at 16. It may not be more extensive than is necessary to eliminate the constitutional violation. *Brennan v. Armstrong*, 433 U.S. 672, 673 (1977); *Milliken II*, 433 U.S. at 281-82; *School District of Omaha v. United States*, 433 U.S. 667, 669 (1977). Thus, the remedy may not be "aimed at eliminating a condition that does not violate the Constitution." *Milliken II*, 433 U.S. at 282. If it were not for certain areas of residential segregation presently existing in Oklahoma City, the court is convinced that the plaintiffs would not have the defendant Board engaged in the present contest. In essence, plaintiffs are asking this court, contrary to the teaching of *Swann*, to perpetuate a remedy to "correct" a condition that does not violate the Constitution. As the court noted earlier, *the Oklahoma City Board of Education is not responsible for the present state of residential segregation in Oklahoma City.* As Justice Powell stated in his concurring opinion to grant certiorari in *Austin Independent School District v. United States*, 429 U.S. 990, 994 (1976):

> The principal cause of racial and ethnic imbalance in urban public schools across the country — North and South — is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing — whether public or private — cannot be attributed to school authorities. Economic pressures and voluntary preferences are the primary determinants of residential patterns.

Plaintiffs are also proposing that this court perpetuate a remedy which *cannot* correct the condition they object to — residential segregation. Virtually all experts in this case agreed that no compulsory desegregation plan implemented by a public school system can eliminate residential segregation, regardless of how long the plan is in operation. (Tr. 115-16, 1028-29, 1245-46). Under plaintiffs' rationale, this court should continue the busing of young students in Oklahoma City until such time as racial balance exists in all neighborhoods. Yet, plaintiffs do not suggest how the school district should go about creating this balance or what kind of order this court could enter that might, as a practical matter, have a chance of changing the present patterns of residential segregation. If this court were to continue the busing of young students until residential segregation no longer existed, then the court would be ordering busing in perpetuity. Such action would be oppressive to the citizens of this community, unrelated to the objective of a school desegregation case, and beyond the scope of an unlawful discrimination remedy. As the United States Supreme Court stated in *Wygant v. Jackson Board of Education*, 476 U.S. ____, 90 L.Ed.2d 260, 270 (1986).

> Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.

It is important to note that a remedial desegregation decree is not designed to continue in perpetuity. Rather, "the displacement of local government by a federal court is presumed to be temporary." *Spangler*

v. Pasadena City Board of Education, 611 F.2d 1239, 1241 (9th Cir. 1979). The remedy is designed to operate during the "interim period when remedial adjustments are being made" to eliminate the dual school system. *Swann*, 402 U.S. at 28. When "the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated," the school district becomes unitary. *Id.* at 31-32. At that point in time, the "court-ordered remedy has accomplished its purpose (and) jurisdiction should terminate." *Spangler*, 611 F.2d at 1242 (Kennedy, C.J. concurring). The perpetual relief sought by the plaintiffs is in direct conflict with these constitutional principles.

In sum, this court concludes that the purposes of the litigation as incorporated in the 1972 decree have been fully achieved. The desegregation order entered in 1972 has fully served its purpose during the "interim period" and accomplished its task of "correcting" the condition that offended the Constitution. This court found the school district unitary and terminated jurisdiction in 1977. The court's unitary finding in 1977 signified that the purposes of the litigation had been fully achieved. The dual school system had been dismantled. Moreover, the school district's continued adherence to the fundamental tenets of the Finger Plan at all grade levels through school year 1984-85 further insured that all vestiges of prior state-imposed segregation had been completely removed. Undoubtedly, after proper implementation for more than a decade, the dangers prevented by the 1972 decree have "become attenuated to a shadow." *See Jan-dal*, 433 F.2d at 305. Today, no child in Oklahoma City is denied admission to school on the basis of race. Nor is the particular school a child attends determined by race. Rather, where a child attends school in Oklahoma City today is determined on a race-neutral basis by where the child resides.

2. Substantial Demographic Change Since 1972 Requires Dissolution Of The Injunction

The Finger Plan appropriately served its purpose during the interim period when remedial adjustments were being made to dismantle the dual school system in Oklahoma City. However, even the Plan's author never intended the Plan to operate in perpetuity. Over time, demographic change in Oklahoma City rendered the "stand-alone" school feature of the Finger Plan inequitable, as is evidenced by the "whiplash" effect it had on the community. The greater the number of "stand-alone" schools, the greater the busing burden placed on young black children. More "stand-alone" schools meant fewer fifth-year centers with fewer schools located in the northeast section of Oklahoma City. With demographic change, the "stand-alone" school feature indeed produced "hardship so extreme and unexpected as to make the decree oppressive." *See Safeway*, 611 F.2d at 800.

B. Summary

When the Oklahoma City School Board adopted its 1985 student assignment plan, it was unitary; and the purpose of this litigation had been fully achieved. The same remains true today. The "substantial change in conditions" which over time resulted in the elimination of illegal discrimination and satisfied the objective of this case is precisely the change which compels dissolving the 1972 decree. As the facts and law no longer require its enforcement, the desegregation decree entered by this court in 1972 should be dissolved.

V.

WHAT ARE THE FUTURE EFFECTS OF THE K-4 PLAN?

Plaintiffs, and those similarly situated, should not fear today's decision, for the Constitution remains intact. Should the Oklahoma City School Board or any other governmental agency go astray, any person ad-

versely affected is free to return to the federal court system, and upon proof of a new constitutional violation, the court will award appropriate remedial relief.

Yet, as the court revealed previously in this decision, the Board's adoption of the 1985 student assignment plan calling for neighborhood elementary schools did not violate the Constitution. The Board adopted the plan for the purpose of avoiding the progressive inequity of the "stand-alone" school feature in the Finger Plan and enhancing academic achievement through increased parental and community involvement and pride in the public schools. The Board's motivation was legitimate, not discriminatory.

A. A Continued Unitary School System

The court views it important that when the Board adopted the neighborhood plan, a "majority-to-minority" transfer provision was provided. This allows the parent of any elementary student attending a school where their race is in the majority to obtain a transfer to a school where their race will be in the minority. This transfer option is encouraged through district-provided, cost-free transportation; and is being exercised by parents in the district. In school year 1985-86, a total of 332 parents exercised the option, the following year, a total of 181 exercised it. (Def. Ex. 108). This type of "majority-to-minority transfer option is recognized by the Supreme Court as an appropriate desegregation tool. *Swann*, 402 U.S. at 26-27. In a word, parents in Oklahoma City today have a choice. No pupil of a racial minority is excluded from any school in Oklahoma City on account of race. Thus, the original objective of this case, once achieved, continues to be met today.

It must also be remembered that the neighborhood school system is in wide use throughout the United States and has been for many years the basis of school administration. In fact, public policy in the

United States and in the state of Oklahoma favors neighborhood schools. 20 U.S.C. § 1701(A)(2); 70 O.S. § 1210.203. The recognized advantages of neighborhood schools were discussed by the Sixth Circuit Court of Appeals in *Deal v. Cincinnati Board of Education*, 369 F.2d 55, 60 (6th Cir. 1966):

> [T]he neighborhood school system . . . is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children reaching school, economy of costs and reducing transportation needs, ease of placement and administration through the use of neutral, easily determined standards, and better home-school communication.

The evidence shows these positive aspects of neighborhood schools apply to Oklahoma City as well.

Plaintiffs assert that the neighborhood school plan recreated a dual school system that the standard is effect, not intent. The Supreme Court, however, has ruled that effect, rather than intent, is focused upon *only* in the remedial phase of the case when a court is determining whether a school board's proposed plan "is a permissible method of dismantling a dual system." *Wright v. Council of Emphoria*, 407 U.S. 451, 462 (1972); *Dayton II*, 443 U.S. at 538 ("The measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual school system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system."). This court's 1977 unitary finding signifies that the Oklahoma City Board of Education had satisfied its affirmative duty to desegregate by eliminating the dual school system. Since the Board had dismantled the dual system at the time it adopted its neighborhood plan, effect does not govern over purpose as plaintiffs suggest.

B. Enhanced Academic Achievement Through the Effective Schools Program

Plaintiffs further contend that young black students cannot achieve academically in schools which are not racially balanced. A substantial amount of evidence and expert testimony was offered on this subject at the hearing, and the court concludes this assertion is without merit. Any suggestion that young blacks are intellectually inferior to young whites is contrary to empirical evidence. Socioeconomic status and the level of parental involvement, rather than the degree of racial balance, are the primary factors which impact academic achievement. (Tr. 848-49, 913-16, 1067-68, 1078, 1454, 1468). For example, Willard Elementary School in Oklahoma City is only 6.6% black, yet its students come from families with the lowest socioeconomic status in the school district. In 1985-86, Willard's overall achievement test scores were the lowest in the district. The overall level of academic achievement at each school which is 90% or more black exceeded that at Willard. (Def. Ex. 182; Tr. 927-28). Furthermore, the evidence shows that socioeconomic factors may be overcome with sound educational programs similar to the defendant Board's "Effective Schools" program. The increased level of parental involvement which came with neighborhood schools, coupled with the Board's "Effective Schools" curriculum, resulted in overall academic gains at 8 of the 10 predominantly black elementary schools exceeding the average gains made by black children nationally. (Def. Ex. 185; Tr. 933-934). More impressive, between 1985-86 and 1986-87 the gap between third grade black and white student achievement test scores was reduced by 13%. (Def. Ex. 185, p. 4) Indeed, the testimony of nationally recognized scholars shows that the Oklahoma City School District is well on its way to becoming a nationally recognized model urban school district. (Tr. 918).

Evidence of successful effective school programs is not limited to Oklahoma City. In Chicago, for example, the high school dropout rate is 65%. However, six all-black schools implementing the effective schools concept send 80-90% of all their students to college. (Tr. 1456-58). Thus, the court concludes that the racial composition of a school has absolutely no effect on the academic achievement of its students. The Oklahoma City School Board believes that all students can learn, and the evidence supports this belief. The court also notes that blacks are not being denied an integrated educational experience, for in grades 5-12 racial balance is maintained via busing.[6]

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[6] The extent of the integrated experience in grades K-12 was aptly described by Clara Luper, Youth Advisor for the NAACP since 1957 and an Oklahoma City teacher of 23 years:

p. 1420
Q. And you teach at John Marshall now?
A. Yes.

p. 1421
Q. Is the faculty at John Marshall integrated?
A. Yes.
Q. Is the staff integrated?
A. Yes.
Q. Are the facilities integrated?
A. I don't understand what you mean if the facilities are integrated.
Q. If the building itself is integrated. Student composition, the student population, is that integrated?
A. Yes.
Q. Are the extracurricular activities integrated at John Marshall?
A. We are moving toward it.
Q. Blacks and whites participate in sports and academic extracurricular activities, is that right?
. . .
A. Yes.
Q. And transportation to the school is integrated, isn't it?
A. Yes.
Q. And the same is true with the junior highs in this district.
A. Yes.

p. 1422
Q. And the middle schools?

C. Summary

It is clear from the evidence that the current Oklahoma City School Board, more so than any this court has read about in reported case law, is conscientiously oriented to its duty to operate a unitary school system. The record shows that the Board is equally committed to providing quality education and achieving academic excellence. For the plaintiffs to claim that the K-4 Plan is a step toward a dual school system is ludicrous and absurd. These words are harsh, but true. In actuality, the Board's actions, along with the testimony of Board members, point toward a future in which the Oklahoma City School System will be nationally revered for its successful efforts to provide a superior education to each pupil regardless of the student's race.

VI.

SHOULD THE FOSTER PLAN BE ADOPTED?

In this phase of the litigation, plaintiffs are asking the court to implement a new desegregation plan prepared by Dr. Gordon Foster. (Plf. Ex. 57). Dr. Foster's proposal employs techniques of pairing, clustering and busing in an effort to maintain racial balance in the school district's K-4 elementary schools. However, Dr. Foster's proposed plan affords remedial relief in addition to that provided in the Finger Plan. Under Dr. Foster's proposal, young white students in grades 1-4 would be bused for the first time in the history of Oklahoma City. Plaintiffs contend that white children should share the busing burden now because blacks carried the burden in the past. Although admirable, this concept simply does not square with principles of equity.

A. Yes.
Q. And the Fifth-Year Centers?
A. Yes.

A. The Foster Plan Is Not Necessary

In light of the unitary status of the Oklahoma City School District, the plaintiffs are precluded from seeking remedial relief in addition to that afforded through the Finger Plan. As the Supreme Court noted in *Pasadena*, 427 U.S. at 436-37:

> [H]aving once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.

Also, the Court of Appeals recognized that, at most, plaintiffs were limited to seeking enforcement of the Finger Plan:

> [P]laintiffs also could not expect more than the approved plan provided. When, five years later, the court determined that the implementation of the Finger Plan had resulted in unitariness in the district, that finding became final, and it, too, is binding upon the parties with equal force . . . We contrast this case with the *Spangler* line of cases in which an aggrieved party sought remedial relief in addition to the previous decree.

Dowell, 795 F.2d at 1522.

B. The Foster Plan Is Not Feasible

Even if the court would have concluded that continued remedial relief in Oklahoma City was appropriate, there are additional reasons why plaintiffs' proposal is not feasible. First, if plaintiffs' proposal were implemented, it is probable that the school district would sustain a substantial wave of white flight. Although white flight cannot be used as a justification for the failure of a board of education to comply with an order to dismantle a dual school system, *United*

States v. Scotland Neck Board of Education, 407 U.S. 484, 491 (1972); *Davis v. East Baton Rouge Parish School Board*, 721 F.2d 1425, 1438 (5th Cir. 1983), the probability of white flight may be considered by a court in solving the integration equation. *Riddick v. School Board of Norfolk*, 784 F.2d 521, 540 (45h Cir. 1986); *Parent Association of Andrew Jackson High School v. Ambach*, 598 F.2d 705, 720 (2nd Cir. 1979); *Stout v. Jefferson County Board of Education*, 537 F.2d 800, 802 (5th Cir. 1976); *Higgins v. Board of Education of Grand Rapids*, 508 F.2d 779, 794 (6th Cir. 1974). Thus, the probability of substantial white flight flowing from Dr. Foster's proposed plan would lead the court to reject it, even if this court had determined that the school district should remain under a remedial order.

In addition to the problems already noted, plaintiffs' busing proposal is not equitable. It pairs and clusters several schools which are already racially balanced. A typical example is the proposed clustering of Gatewood (29% black), Wilson (51% black) and Hawthorne (19% black). (Tr. 1377).

Additionally, the school district's superintendent, Dr. Arthur W. Steller, pointed out that if Dr. Foster's proposal were implemented it would adversely impact the school district and its recent accomplishments, in several respects. The total cost of implementing Plan A in the first year would be $7,402,913.50. For each year after that the cost would be $1,678,958.50. (Tr. 1500). During a time when the Oklahoma City School Board is confronted with substantial budget cuts, expenditures of this nature would cut directly into and adversely impact the effective schools program and retard the progress being made by students of all races.

C. Summary

Dr. Foster's proposal calls for the wholesale cross-town busing of young students in Oklahoma City. It

envisions perpetual implementation. In light of the school district's unitary status, the potential harms related to busing students at this tender age must be given serious consideration. Indeed, "[i]t is becoming increasingly doubtful that massive public transportation really accomplishes the desirable objectives sought." *Columbus*, 443 U.S. at 469 (Berger, C.J., concurring in judgment). In conclusion, Dr. Foster's busing proposal would not be acceptable to this court even if the court viewed it appropriate to retain further jurisdiction over the school district. The Foster Plan should not be adopted.

VII.

CONCLUSION

The Oklahoma City School District was declared unitary ten years ago, and it remains unitary today. After more than 25 years of litigation, it is time to return total control over the schools in Oklahoma City to its Board of Education. This court's regulatory control must not extend beyond the time required to remedy the effects of past intentional discrimination. *Milliken II*, 433 U.S. at 280-82. Today there are no vestiges of the past intentional discrimination which occurred in Oklahoma City; there are no indications that de jure segregation will again rear its ugly head in this community; and the purpose of this case has been fully achieved. The School Board's K-4 neighborhood school plan is constitutionally and educationally sound. Thus, its continued implementation will not be disturbed. The 1972 desegregation decree should be dissolved (along with any other injunctions issued before or during the Finger Plan's operation), and the court's remedial jurisdiction should be totally relinquished.

Based upon the foregoing findings of fact and conclusions of law, an appropriate Order, Judgment and Decree will be issued without unnecessary delay.

Dated this 9th day of December, 1987.

/s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE